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# The European Commission's New Pact on Migration and Asylum

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Horizontal  
substitute impact  
assessment

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STUDY

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# The European Commission's new pact on migration and asylum

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This 'Horizontal Substitute Impact Assessment of the European Commission's new pact on migration and asylum' was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE). The impact assessment (IA) focuses on the main proposed changes implied by the European Commission's new pact, with a particular focus on the following four proposed regulations: 1) asylum and migration management regulation (RAMM); 2) crisis and force majeure regulation; 3) amended Asylum Procedure Regulation (APR); and 4) screening regulation.

The horizontal substitute IA critically assesses the 'system' and underlying logic of the proposed new pact with the aim of analysing how the four Commission proposals would work and interact in practice. The IA also assesses whether and to what extent the proposed new pact addresses the identified shortcomings and implementational problems of current EU asylum and migration law and policy. Moreover, the IA identifies and assesses the expected impacts on fundamental rights, as well as economic, social and territorial impacts of the proposed new pact.

The IA concludes that all of the assessed dimensions will be influenced by the proposed new pact. Although interviewed stakeholders indicate that, in certain cases, the new pact stands to have positive impacts on various aspects of migration and asylum in the EU, the overall consensus is that the new pact, as it is currently presented by the Commission, will have significantly negative consequences for Member States, local communities and migrants. Such potential negative effects have been found in all four dimensions covered by the IA: territorial, economic, social and fundamental rights.

## **AUTHORS**

This study has been written by Ecorys in collaboration with Dr Galina Cornelisse of Free University of Amsterdam and Dr Giuseppe Campesi of University of Bari at the request of the Ex-ante Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament. The Quality Review has been conducted by Lina Vosyliute, Roberto Cortinovis and Sergio Carrera.

This revised edition brings changes to the economic impact analysis in section 6, in particular sections 6.2.11 and 6.3.3, as well as annex E. These detailed revisions do not, however, change the overall findings and conclusions of the impact assessment.

## **ADMINISTRATORS RESPONSIBLE**

Dr Katharina Eisele and Dr Meenakshi Fernandes, Ex-ante Impact Assessment Unit, EPRS

To contact the publisher, please e-mail [eprs-impactassessment@europarl.europa.eu](mailto:eprs-impactassessment@europarl.europa.eu)

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## Executive summary

### Background

In 2015, the European Union (EU) witnessed a substantial increase in arrivals of asylum seekers, a third of whom were fleeing the persecution and turmoil following the prolonged Syrian war and humanitarian crisis. In that year alone, the number of asylum seekers in the EU reached 1 322 825.

In May 2015, the European Commission presented a 'European Agenda on Migration', with the aim of formulating adequate and harmonised policy responses at EU level. This set the course for EU action in the area of migration and asylum between 2015 and 2020.

In 2016, the Commission launched an overall reform of the Common European Asylum System (CEAS) with the aim of further harmonising the EU asylum *acquis*. The Commission underlined the need to address identified weaknesses in the design and implementation of the CEAS, and in particular, the 'Dublin system', a mechanism that assists Member States to determine which country is responsible for processing an asylum application from a non-EU country or a stateless individual. Two packages of proposals were presented within this reform framework. However, Member States failed to reach an agreement on key regulations, such as the reform of the Dublin system and the Asylum Procedures Regulation. This left significant shortcomings in the EU asylum and migration framework.

The human rights situation for migrants and refugees continues to be alarming. In September 2020, the **Commission presented a 'new pact on migration and asylum'** (hereinafter, 'the new pact') with the objective of addressing the identified structural shortcomings within the context of national reception, asylum and return systems of EU Member States.

The new pact is composed of five legal instruments,<sup>1</sup> three recommendations<sup>2</sup> and one guidance document.<sup>3</sup> It has four building blocks: pre-entry procedures at external borders; mechanisms for responsibility sharing and solidarity; a special mechanism for crisis and force majeure; novelties in the governance mechanism in the area of asylum and migration. Under the framework of the new pact, the Commission aims to achieve a more comprehensive European approach to migration management, including 'improved and faster procedures', designed to enforce the 'principles of fair sharing of responsibility and solidarity'.

The new pact was accompanied by a European Commission staff working document (SWD(2020) 207) but not by an ex-ante impact assessment, which would be a prerequisite to comply with commitments under the 2016 Interinstitutional Agreement on Better Law-Making. The lack of a comprehensive impact assessment was criticised by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), whose Members called for a critical analysis of whether and how the Commission's proposals under the new pact would address the existing problems in practice.

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<sup>1</sup> A new screening regulation; an amended proposal revising the Asylum Procedures Regulation; an amended proposal revising the Eurodac Regulation; a new asylum and migration management regulation; a new crisis and force majeure regulation.

<sup>2</sup> A new migration preparedness and crisis blueprint; a new recommendation on resettlement and complementary pathways; a new recommendation on search and rescue operations by private vessels.

<sup>3</sup> New guidance on the Facilitators Directive.

## Scope of this study

This '**Horizontal Substitute Impact Assessment of the European Commission's new pact on migration and asylum**', requested by the LIBE Committee, focuses on the main proposed changes envisaged by the new pact, and in particular on the following four proposals underpinning it:

1. Asylum and migration management regulation (RAMM), COM(2020) 610 final;
2. Crisis and force majeure regulation, COM(2020) 613 final;
3. Amended Asylum Procedure Regulation (APR), COM(2020) 611 final;
4. Screening regulation, COM(2020) 612 final.

The aim of this impact assessment study is to critically assess the 'system' and underlying logic of the new pact, and analyse how the four Commission proposals would work and interact in practice. The assessment also looks into whether and how the new pact addresses the identified shortcomings of the current EU asylum and migration law and policy, and the expected economic, social, and territorial impacts, as well as the impact on fundamental rights compared to a continuation of the status quo.

In line with a standard impact assessment approach, the study has critically reviewed: the Commission's identification of problems and underlying drivers; the objectives of the new pact; the subsidiarity and proportionality of the measures proposed; the main elements of the new pact; the expected impacts; the effectiveness, efficiency, coherence and proportionality of the measures proposed; and the adequacy of the mechanisms introduced to monitor and evaluate implementation of the new pact.

## Methodology

This impact assessment was conducted between April and July 2021. Data collection methods included extensive desk research and document and literature review of recently published studies and legal instruments; in-depth stakeholder consultations; and six country case studies. The research team held over 30 semi-structured interviews with and received additional (15) written inputs from a range of experts, including representatives of the European Commission and relevant EU agencies, migration and asylum practitioners, national Member State authorities, and civil society representatives. In-depth research at country level was conducted for Germany, Greece, Italy, Poland, Spain and Sweden.

A standard impact assessment methodology as described in the Commission's 2017 Better Regulation Guidelines and Better Regulation Toolbox was applied to assess the impact of the four proposed measures of the new pact in terms of social and fundamental rights, as well as economic and territorial impact. For the economic analysis, in particular, a standard cost model approach was adopted to assess the potential costs and benefits of implementation.

## Key findings

The study finds that the Commission's **identification of problems and underlying drivers** – which serves as the basis for the development of the objectives of the new pact – lacks clarity, and that the proposed policy solutions are anticipated rather than derived from a solid evidence base. The relationship between problems, objectives and measures is not always set out clearly in the new pact, with objectives often not clearly distinguished from measures. This makes it difficult to assess the relationship between means and ends and undermines the robustness of the logical chain underpinning the new pact.

The **objectives**<sup>4</sup> of the new pact are not well defined, and often clear criteria for evaluating the effectiveness of EU action are lacking. In particular, there is no clear justification for combining the objective of achieving a fairer and effective system to strengthen migrants' and asylum seekers' rights with that of accelerating asylum procedures. There is also no adequate justification as to how the latter objective relates to the specific (human rights) challenges encountered by migrants and asylum seekers.

While the objectives of procedural efficiency and effectiveness; solidarity; countering secondary movements; preventing abuse, combating irregular migration and cooperation on return; and effective protection of migrants' rights do correlate to the problems identified by the Commission, they do not always correspond to other evidenced existing problems, most notably the implementation gap of the CEAS as a whole, which remains largely unaddressed.

The **legal basis** for the proposals presented by the Commission is considered to be largely adequate, except with regard to the proposed screening regulation and its application within the territory of a Member State. The study also considers that the legal basis of the RAMM could be further strengthened. Most of the problems that the new pact aims to address are cross-border by nature and cannot be addressed by the Member States alone. Therefore, the EU has a right to act and **EU added value** is evident. However, proportionality concerns are raised by the administrative and procedural complexity introduced by the four proposals, which in turn may hinder the achievement of an integrated European approach.

The study further considers that the **main novelties proposed by the new pact** with regard to pre-entry procedures (mandatory screening at external borders, mandatory asylum procedures and return border procedures) are characterised by a legal fiction of non-entry that is neither adequately justified nor explained. This leads to concerns that these procedures will entail excessive use of detention.

Findings also show that the RAMM, introduced as a replacement for the Dublin system and for establishing solidarity as a structural component of the CEAS, will not alleviate existing imbalances in the distribution of asylum seekers across Member States, but rather reinforce the first country of entry criterion. Concerns are raised with regard to the solidarity mechanism, as mandatory solidarity is only activated in a set of cases. Our economic impact analysis shows that return sponsorship is financially the most attractive for Member States other than frontline Member States (Greece, Italy and Spain).

In terms of the **expected impacts of the implementation of the new pact**, findings show that the proposed measures stand to affect all dimensions analysed, most significantly on the fundamental rights and territorial dimensions.

In particular, pre-entry procedures for asylum seekers from a broadened EU definition of 'safe' countries are expected to have a positive financial effect due to reduced deadlines, which outweigh the cost of complying with minimum reception conditions. However, these procedures are expected to have a negative impact on fundamental rights, although families with children aged under 12 years will be exempted from the mandatory border procedure. This is especially on account of the ambiguity between the legal fiction of non-entry and detention, the extended periods of time spent in detention, and the exclusion of the suspensive effect of appeals in border procedures.

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<sup>4</sup> A more efficient, seamless and harmonised migration management system; a fairer, more comprehensive approach to solidarity and relocation; simplified and more efficient rules for robust migration management; a targeted mechanism to address extreme crisis situations; and a fairer and more effective system to reinforce migrants and asylum seekers' rights.

The non-entry fiction reduces secondary movements during the mandatory border procedure, and the collection of biometric data and the requirement of minimum reception conditions (if complied with) will facilitate Dublin take-back transfers of asylum seekers to the country of first entry. Overall, this shifts costs from preferred destination countries in the northwest of Europe to frontline Member States (Greece, Italy, Spain).

The lack of promotion of safe pathways for migration is expected to potentially enhance the dependency of migrants on irregular and/or illegal routes, as well as their exposure to criminal activity and networks. Return sponsorships may also expose migrants subject to the return order to additional dangers in terms of fundamental rights protection.

Territorial unbalances within Member States are also expected as a result of the potential increase in the number of reception centres in border regions due to the mandatory nature of the pre-entry screening and border procedures introduced, unless the border is assumed to move with the asylum seeker. More positively, the redefinition of the rules on attribution of responsibility proposed under the new pact is expected to have positive impacts on family reunification.

In terms of the **effectiveness, coherence and proportionality** of the measures proposed, doubts remain as to whether the new pact will be able to remedy existing problems. In particular, findings show that the measures proposed do not solve the problem of national reception systems that are subject to disproportionate pressure.

The European added value of the proposed solutions with regard to solidarity and responsibility-sharing remains questionable. The new pact also largely fails to put forward solutions for current problems with regard to the protection of migrants and asylum seekers' fundamental rights. On the contrary, the proposed measures, and in particular the pre-entry procedures, are likely to exacerbate the problems related to the extensive recourse to measures limiting migrants' and asylum seekers' personal liberty.

Finally, questions remain with regard to how concrete implementation of the **monitoring and evaluation mechanisms** proposed by the new pact will take place. While some of the four proposals do specify reporting requirements for monitoring purposes, concrete evaluation criteria or indicators are not specified. Neither is there an indication of whether and how Member States who do not comply with the monitoring and reporting requirements would be sanctioned. The proposed increased reporting obligation from EU agencies are considered as a positive element that might help to increase the efficiency and effectiveness of the new pact.

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## List of Abbreviations

APD	Asylum Procedures Directive
APR	Asylum procedures regulation, European Commission proposal COM(2020) 611
CEAS	Common European Asylum System
CSO	Civil society organisation
CFR	Council on Foreign Relations
CJEU	The Court of Justice of the European Union
Dublin III	The Dublin Regulation
EASO	European Asylum Support Office
EAV	European added value
EBCG, FRONTEX	European Border and Coast Guard Agency
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EESC	European Economic and Social Committee
EMN	European Migration Network
EP	European Parliament
EPRS	European Parliamentary Research Service
EU	European Union
EUAA	European Union Agency for Asylum
EURODAC	European Dactyloscopy
EUROSTAT	European Statistical Office
FRONTEX	European Border and Coast Guard Agency
FRA	Fundamental Rights Agency
FSWG	European Parliament Frontex Scrutiny Working Group
GDP	Gross domestic product
IA	Impact assessment
IBM	Integrated border management
IDPs	Internally displaced persons
IIA BLM	2016 Interinstitutional Agreement on Better Law-Making

LIBE Committee	European Parliament Committee on Civil Liberties, Justice and Home Affairs
M&E	Monitoring and evaluation
MEPs	Members of the European Parliament
NGO/NGOs	Non-governmental organisation(s)
OHCHR	Office of the United Nations High Commissioner for Human Rights
RAMM	Asylum and migration management regulation, European Commission proposal COM(2020) 610
SAR	Search and rescue
SCM	Standard cost model
SWD	European Commission staff working document, SWD(2020) 207, accompanying the new pact on migration and asylum
TCN/TCNs	Third country national(s)
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees
VIS	Visa Information System

## Glossary

This glossary contains a selection of terms deemed relevant for this study. It primarily builds on the terms as defined in the IOM's and European Migration Network glossary.<sup>5</sup>

Admission (into a State)	Authorisation by the immigration authorities to enter into the State.
Admission ban/entry ban	An administrative or judicial decision or act preventing entry into the territory of the State of issuance for a specified period.
Age assessment	Process by which authorities seek to establish the age, or range of age, of a person to determine whether an individual is a child or not.
Appeal	A proceeding undertaken to have a decision reconsidered by a higher authority, especially the submission of a lower court's or agency's decision to a higher court for review and possible reversal.
Applicant	<p>A person who formally requests administrative or judicial action, such as the granting of a visa, work permit or refugee status.</p> <p><i>Bona fide:</i> An individual whose application for entry and/or residence in a State, or international protection is considered genuine, without fraud or deceitful claims, and is not likely to breach the conditions of entry or residence.</p> <p><i>Principal:</i> The person who applies for refugee or other immigration status and under whose name the application is made (also main or primary applicant).</p> <p><i>Rejected:</i> An applicant for admission or asylum refused entry or stay into a State by immigration authorities, or access to refugee status or another form of international protection, because he or she fails to meet the relevant eligibility criteria.</p>
Application	A request, usually written, submitted to the administrative authorities by an individual or an employer seeking administrative or judicial action such as the granting of a visa, a work permit or refugee status.
Armed conflict	A conflict in which there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.
Assisted voluntary return and reintegration	Administrative, logistical or financial support, including reintegration assistance, to migrants unable or unwilling to remain in the host country or country of transit and who decide to return to their country of origin.

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<sup>5</sup> [European Migration Network Glossary](#) and [International Organisation of Migration Glossary](#).

Asylum	The grant, by a Member State, of protection on its territory to persons outside their country of nationality or habitual residence, who are fleeing persecution or serious harm or for other reasons. Asylum encompasses a variety of elements, including non-refoulement, permission to remain on the territory of the asylum country, humane standards of treatment and eventually a durable solution.
Asylum seeker	An individual who is seeking international protection. In countries with individualised procedures, an asylum seeker is someone whose claim has not yet been finally decided on by the country in which he or she has submitted it. Not every asylum seeker will ultimately be recognised as a refugee, but every recognised refugee is initially an asylum seeker.
Border control	Border checks and border surveillance activities conducted at the physical borders – air (airports), sea (sea, lake, river ports) and land borders (land, railway) – of the State aimed at regulating the entry (or the intention to enter) and departure of persons, animals and goods to and from the State's territory, in exercise of its sovereignty.
Border procedure	The border procedure may be applied where the applicant makes an application directly at the designated border areas or transit zones after being apprehended for evading or attempting to evade controls.
Common European Asylum System	The Common European Asylum System sets out common standards and co-operation to ensure that asylum seekers are treated equally in an open and fair system – wherever they apply. The system is governed by five legislative instruments and one agency
Citizen/ national	A person who is a member of a particular country and who has rights because of being born there or because of being given rights, or a person who lives in a particular town or city:
Country of destination	A country that is the destination for a person or a group of persons, irrespective of whether they migrate regularly or irregularly.
Country of origin/home country	A country of nationality or of former habitual residence of a person or group of persons who have migrated abroad, irrespective of whether they migrate regularly or irregularly.
Crisis situation	An exceptional situation of mass arrival of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State's asylum, reception or return system non-functional and can have serious consequences for the functioning of the Common European Asylum System or the Common Framework as set out in the

	proposed regulation on asylum and migration management, or an imminent risk of such a situation.
Degrading treatment	A treatment that humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.
Detention	The deprivation of liberty for migration-related reasons.
Detention centre	A specialised facility used for the detention of migrants with the primary purpose of facilitating administrative measures such as identification, processing of a claim or enforcing a removal order.
Discrimination	Any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.
Displaced persons	Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, either across an international border or within a State, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters.
Dublin III Regulation	The Dublin Regulation (EU) No.604/2013 ('Dublin III') is EU legislation that establishes the criteria and mechanisms for determining which single Member State is responsible for examining an application for international protection (an asylum claim). It aims to prevent both 'asylum shopping', where an individual moves between States to seek the most attractive regime of protection, and the phenomenon of 'refugees in orbit' where no single State permits access to an asylum procedure. It reflects the principle that those seeking international protection should seek asylum in the first safe country they reach. <sup>6</sup> It applies in all EU Member States as well as Iceland, Norway, Switzerland and Liechtenstein. Durable solution (refugees) Any means by which the situation of refugees can be satisfactorily and permanently resolved to enable them to lead normal lives.
Entry	<i>Legal:</i> In the migration context, any crossing of an international border by a non-national to enter into a country,

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<sup>6</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), European Parliament, 2013.

	<p>whether such a crossing is voluntary or involuntary, authorised or unauthorised.</p> <p><i>Irregular/illegal/unauthorised/unlawful:</i> The act of crossing borders without complying with all the legal and administrative requirements for entry into the State.</p>
Entry ban	An administrative or judicial decision or act preventing entry into and stay in the territory of the issuing State for a specified period, usually accompanying a return decision.
Expulsion/deportation	A formal act or conduct attributable to a State by which a non-national is compelled to leave the territory of that State.
Family reunification (right to)	The right of non-nationals to enter into and reside in a country where their family members reside lawfully or of which they have the nationality in order to preserve the family unit.
First country of asylum	Within some asylum systems, for a particular applicant for international protection, a State where he or she has already been granted international protection, that remains accessible and effective for the individual concerned.
Forced return	The act of returning an individual, against his or her will, to the country of origin, transit or to a third country that agrees to receive the person, generally carried out on the basis of an administrative or judicial act or decision.
Freedom of movement	In human rights law, a human right comprising three basic elements: freedom of movement within the territory of a country and to choose one's residence, the right to leave any country and the right to return to one's own country.
Human rights	Universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity.
Hotspot Approach	Approach where the European Asylum Support Office (EASO), the European Border and Coast Guard Agency (Frontex), Europol and Eurojust work on the ground with the authorities of frontline EU Member States which are facing disproportionate migratory pressures at the EU's external borders to help to fulfil their obligations under EU law and swiftly identify, register and fingerprint incoming migrants.
International protection	The protection that is accorded by the international community to individuals or groups who are outside their own country and are unable to return home because their return would infringe upon the principle of non-refoulement, and their country is unable or unwilling to protect them.
Immigrant	From the perspective of the country of arrival, a person who moves into a country other than that of his or her nationality or usual residence, so that the country of destination effectively becomes his or her new country of usual residence.

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Immigration status	The status of a migrant under the immigration law of the country of destination.
Integration	The two-way process of mutual adaptation between migrants and the societies in which they live, whereby migrants are incorporated into the social, economic, cultural and political life of the receiving community. It entails a set of joint responsibilities for migrants and communities, and incorporates other related notions such as social inclusion and social cohesion.
Irregular stay	The presence on the territory of a State, of a non-national who does not fulfil, or no longer fulfils the conditions of entry, stay or residence in the State.
Migrant (see also migration)	<p>An umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.</p> <p><i>Documented:</i> A migrant authorised to enter and to stay pursuant to the law of that State or to international agreements to which that State is a party and who is in possession of documents necessary to prove his or her regular status in the country.</p> <p><i>Economic:</i> Any person who is moving or has moved across an international border or within a State, solely or primarily motivated by economic opportunities.</p> <p><i>Environmental:</i> A person or group(s) of persons who, predominantly for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are forced to leave their places of habitual residence, or choose to do so, either temporarily or permanently, and who move within or outside their country of origin or habitual residence.</p> <p><i>Irregular/undocumented:</i> A whole array of terms are used for those migrants who do not have the required legal documentation or authorisation to enter and/or reside within a given territory. Terms such as illegal, unauthorised, undocumented, non-compliant, prohibited and irregular are a few terms of commonly used by States in this context.</p>
Migration	The movement of persons away from their place of usual residence, either across an international border or within a State.

	<p><i>Forced:</i> A migratory movement which, although the drivers can be diverse, involves force, compulsion, or coercion.</p> <p><i>Irregular:</i> Movement of persons that takes place outside the laws, regulations, or international agreements governing the entry into or exit from the State of origin, transit or destination.</p> <p><i>Regular:</i> Migration that occurs in compliance with the laws of the country of origin, transit and destination.</p> <p><i>Temporary:</i> Migration for a specific motivation and purpose with the intention to return to the country of origin or habitual residence after a limited period of time.</p>
Migration flow	The number of international migrants arriving in a country (immigrants) or the number of international migrants departing from a country (emigrants) over the course of a specific period.
Migratory pressure	A situation where there is a large number of arrivals of third-country nationals or stateless persons, or a risk of such arrivals, including where this stems from arrivals following search and rescue operations, as a result of the geographical location of a Member State and the specific developments in third countries which generate migratory movements that place a burden even on well-prepared asylum and reception systems and requires immediate action.
Minority	A group numerically inferior to the rest of the population of a State and/or in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.
Net migration	Net number of migrants in a given period, that is, the number of immigrants minus the number of emigrants.
Non-admission	The refusal by immigration authorities to permit entry into the State's territory.
Non-national	A person who is not a national or citizen of a given State.
Non-refoulement principle	The prohibition for States to extradite, deport, expel or otherwise return a person to a country where his or her life or freedom would be threatened, or where there are substantial grounds for believing that he or she would risk being subjected to torture or other cruel, inhuman and degrading treatment or punishment, or would be in danger of being subjected to enforced disappearance, or of suffering another irreparable harm.
Overstay	To remain in a country beyond the period for which entry or stay was granted.

Permanent residence	The right, granted by the authorities of a State of destination to a non-national, to live therein on a permanent (unlimited or indefinite) basis.
Permit	In the migration context, documentation, such as a residence or work permit, which is usually issued by a government authority and which evidences the permission a person has to reside and/ or carry out a remunerated activity.
Persecution	A threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group. Other serious violations of human rights for the same reasons also constitute persecution.
Reception centre	A facility lodging migrants, including asylum seekers or refugees, in an irregular situation on arrival in a receiving country, while their status is determined.
Temporary Protection	Temporary protection is an exceptional measure to provide immediate and temporary protection to displaced persons from non-EU countries and those unable to return to their country of origin. It applies when there is a risk that the standard asylum system is struggling to cope with demand stemming from a mass influx risking a negative impact on the processing of claims.
Protection	All activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. Human Rights law, International Humanitarian Law, Refugee law).
Push/pull factors	A model categorising the drivers of migration into push and pull factors, whereby push factors are those which drive people to leave their country and pull factors are those attracting them into the country of destination.
Pushback	Illegal 'pushbacks' refers to informal and often violent rejections of migrants back to the country from where they attempted to cross or have crossed without access to an asylum procedure.
Readmission	Act by a State accepting the re-entry of an individual (own national, national of another State – most commonly a person who had previously transited through the country or a permanent resident – or a stateless person).
Receiving country	Usually, the country of destination of a migrant. In the case of return or repatriation, also the country of origin or, in the context of resettlement, a country that has accepted to receive a certain number of migrants, including refugees, on a yearly basis by presidential, ministerial or parliamentary decision. In the context of diplomatic or consular relations, the receiving country is the State which has consented to the

	establishment of consular posts or diplomatic missions of another State on its territory.
Reception facilities	All forms of premises used for the housing of applicants for international protection and other categories of migrants, including refugees, whilst individuals await decisions on applications for admission or on international protection.
Refugee	<i>1951 Convention:</i> A person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. <i>Mandate:</i> A person who qualifies for the protection of the United Nations provided by the High Commissioner for Refugees (UNHCR), in accordance with UNHCR's Statute and, notably, subsequent General Assembly's resolutions clarifying the scope of UNHCR's competency, regardless of whether or not he or she is in a country that is a party to the 1951 Convention or the 1967 Protocol – or a relevant regional refugee instrument – or whether or not he or she has been recognised by his or her host country as a refugee under either of these instruments. <i>Prima facie:</i> Persons recognised as refugees, by a State or the United Nations High Commissioner for Refugees, on the basis of objective criteria related to the circumstances in their country of origin, which justify a presumption that they meet the criteria of the applicable refugee definition.
Refusal of entry	Refusal to let a person enter the State when the person does not fulfil all the entry conditions laid down in the national legislation of the country of which entry is requested.
Regular migration pathways	Migration schemes, programmes or other migration options that allow eligible persons to migrate regularly for various purposes to a concerned country of destination based on conditions and for a duration defined by such country.
Repatriation	The personal right of a prisoner of war, civil detainee, refugee, or of a civilian to return to his or her country of nationality under specific conditions laid down in various international instruments.
Rescue at sea	An operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.
Resettlement (refugees)	The transfer of refugees from the country in which they have sought protection to another State that has agreed to admit them – as refugees – with permanent residence status.

Residence	The act or fact of living in a given place for some time; the place where one actually lives as distinguished from a domicile. Residence usually means bodily presence as an inhabitant in a given place.
Return	In a general sense, the act or process of going back or being taken back to the point of departure. This could be within the territorial boundaries of a country, as in the case of returning internally displaced persons (IDPs) and demobilised combatants; or between a country of destination or transit and a country of origin, as in the case of migrant workers, refugees or asylum seekers.
Right to seek asylum	The right of individuals to seek asylum from persecution in a country other than the person's State of nationality or habitual residence.
Safe third country	A country in which an asylum seeker could have had or has access to an effective asylum regime, or in which he/she had previously made an application for international protection that has not been determined. The concept is typically applied to situations where the individual concerned has some further connection with the country in question, notably where he or she had stayed in that country prior to arriving in the country in which he or she is applying for asylum.
Schengen (Area)	Signifies a zone where 26 European countries, abolished their internal borders, for the free and unrestricted movement of people, in harmony with common rules for controlling external borders and fighting criminality by strengthening the common judicial system and police cooperation. Schengen Area covers most of the EU countries, except Ireland and the countries that are soon to be part of Romania, Bulgaria, Croatia and Cyprus. Although not members of the EU, countries like Norway, Iceland, Switzerland and Lichtenstein are also part of the Schengen zone. <sup>7</sup>
Screening process	In the migration context, a preliminary assessment of the identity, individual situation, age and reasons for migration of persons seeking entry in a country, aimed at identifying persons who may be seeking asylum or who may otherwise be in need of some forms of protection or assistance.
Search and Rescue	Search and rescue operation refer to an operation of EU Member States to render assistance to any vessel or person in distress at sea regardless of the nationality or status of such a person or the circumstances in which that person is found in accordance with international law and respect for fundamental rights. <sup>1</sup>

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<sup>7</sup> Schengen Visa Information [website](#).

Secondary movement	The movement of a migrant from their first country of destination to another country, other than the country in which he or she originally resided and other than the person's country of nationality.
Situation of Force Majeure	When Member States are faced with abnormal and unforeseeable circumstances outside their control, the consequences of which could not have been avoided despite the exercise of all due care.
Smuggling (of migrants)	The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the irregular entry of a person into a State Party of which the person is not a national or a permanent resident.
Take Back request	Under the Dublin Regulation, a take back request refers to a request for another Member State to take responsibility for an asylum application. <sup>8</sup>
Take Charge request	Under the Dublin Regulation, a take charge request refers to a request for another Member State to accept responsibility for an asylum application. <sup>9</sup>
Third Country Nationals	In situations in which two States are concerned, any person who is not a national of either State; or, in the context of regional organisations, nationals of States who are not member States of such organisation.
Trafficking (in human beings)	The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.
Transit	A stopover of passage of varying length while travelling between two or more States.
Unaccompanied children	Children, as defined in Article 1 of the Convention on the Rights of the Child, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.
Visa	An endorsement by the competent authorities of a State in a passport or a certificate of identity of a non-national who wishes to enter, leave, or transit through the territory of the

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<sup>8</sup> IPO, [EU Dublin Regulation](#).

<sup>9</sup> IPO, [EU Dublin Regulation](#).

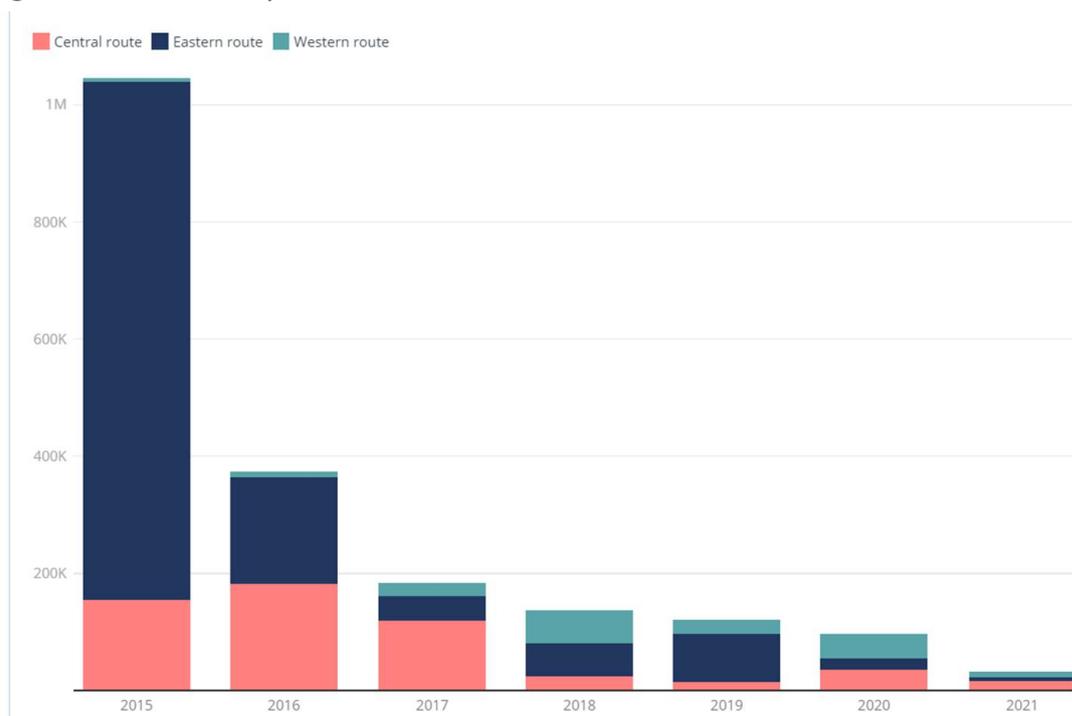
	<p>State that indicates that the authority, at the time of issuance, considers the holder to fall within a category of non-nationals who can enter, leave or transit the State under the State's laws. A visa establishes the criteria of admission into, transit through or exit from a State.</p>
Voluntary return	<p>The assisted or independent return to the country of origin, transit or another country based on the voluntary decision of the return.</p>

# 1. Background

## 1.1. Facts and figures

In the summer of 2015, the European Union (EU) witnessed a substantial increase in arrivals of asylum seekers. In 2015 alone, more than one million people fled across the Mediterranean Sea, with annual data indicating that the number of asylum seekers in the EU exceeded 1.3 million.<sup>10</sup> The majority of asylum seekers were individuals fleeing persecution, conflict and turmoil in their own countries. While the number of migrants and asylum seekers to the EU dropped by **92%** between 2015 and 2019, the composition of migratory flows and the nature and source of migratory pressures across third countries have changed significantly since 2015.<sup>11</sup> As illustrated in the figure below, in 2015, most migrants arrived via the Eastern route.<sup>12</sup>

Figure 1.1:1 – Monthly Mediterranean Sea and land arrivals 2015 to 2020



Source: [Operational Data Portal](#), UNHCR website.

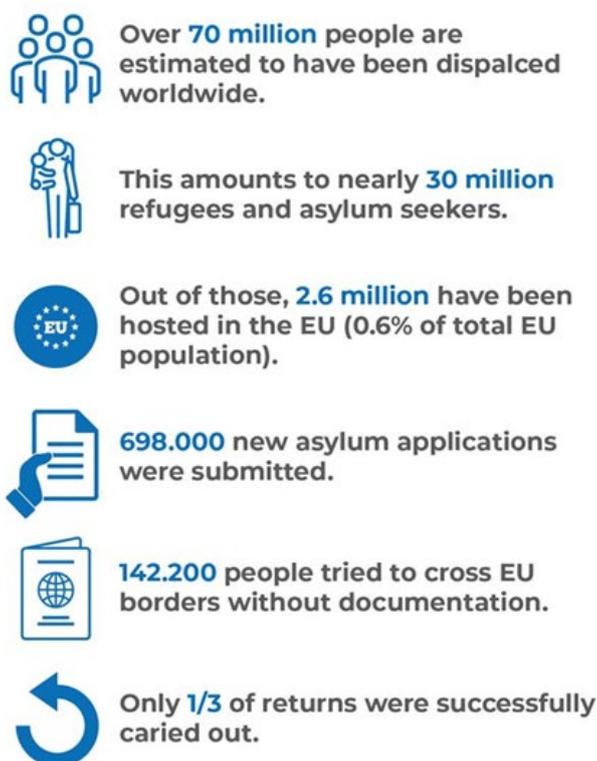
<sup>10</sup> Wouter van Ballegooij and Cecilia Navarra, [The Cost of Non Europe in Asylum Policy](#), EPRS, European Parliament, October 2018, p. 17.

<sup>11</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], [COM\(2020\) 610](#) final, p. 10.

<sup>12</sup> The Eastern Mediterranean route refers to migrants arriving in Greece, Cyprus and Bulgaria. The Central route refers to migrants arriving from North Africa who cross the Mediterranean Sea to reach Europe. The Western route refers to migrants arriving in Spain, both via the Mediterranean Sea to mainland Spain and by land to the Spanish enclaves of Ceuta and Melilla in Northern Africa.

Figure 1.1:2 shows that, by 2019, the EU hosted 2.6 million of the 70 million displaced people worldwide due to armed conflict, generalised violence or human rights violations.<sup>13</sup> This figure is equivalent to 0.6 % of the EU's population at the time.

Figure 1.1:2 – Migration statistics: Key facts and figures 2019



Source: [The new pact on migration and asylum A Brief Summary and Next Steps](#), Key Facts and Figures, 89 Initiative, p.8, derived from [Statistics on migration to Europe](#).

The human rights situation of migrants and refugees remains dire, with thousands of migrants and refugees dying on their way to Europe. In the first two months of 2021, it was estimated that 250 migrants had died while crossing the Mediterranean Sea. In 2020, the number of deaths amounted to 1 400.<sup>14</sup> Civil society organisations (CSOs) have criticised the living conditions of refugees across Europe.<sup>15</sup> Furthermore, there have been increasing allegations of illegal 'pushbacks'<sup>16</sup> at EU's external borders by several Member States.<sup>17</sup> In addition, a meeting was held on 3 March 2021, between the European Parliament Frontex Scrutiny Working Group (FSWG) and the agency's Executive Director Fabrice Leggeri and Commissioner Ylva Johansson.<sup>18</sup> Although the

<sup>13</sup> UNHCR, [Global Trends on Forced Displacement](#) in 2019.

<sup>14</sup> Statista, [Deaths-of-migrants-in-the-mediterranean-sea](#), 2021.

<sup>15</sup> In September 2020, for example, fires destroyed Greece's largest migrant camp, an overcrowded facility located in Moria on the island of Lesbos, leaving nearly 13 000 people without shelter.

<sup>16</sup> Illegal 'pushbacks' refers to informal and often violent rejections of migrants back to the country from where they attempted to cross or have crossed without access to an asylum procedure.

<sup>17</sup> ECRE, [Report on Illegal Pushback and Border Violence](#), 2019; and European Parliament Briefing, [Pushbacks at the EU's external borders](#), 2020. See also Meijers Committee, 21 April 2021, Frontex and pushbacks: obligations and accountability, CM2105.

<sup>18</sup> [LIBE](#) Committee, '[First meeting of the Frontex Scrutiny Group with Leggeri and Johansson](#)', Press Release, 3.3.2021.

Group found no evidence of Frontex' potential involvement in fundamental rights violations in the context of illegal pushback, evidence did indicate that the Agency had failed to address and follow-up on violations committed by Member States' authorities.<sup>19</sup>

## 1.2. Policy developments – the new pact on migration: A fresh start on migration?

In September 2020, the Commission proposed a **new pact on migration and asylum** (hereinafter, 'the new pact'). The new pact's objective is to address existing structural shortcomings within the context of national reception, asylum and return systems of EU Member States in EU asylum and migration law and policy, making it a 'fresh start on migration'.<sup>20</sup> Furthermore, under the new pact, the Commission envisages a **more comprehensive European approach to migration management**, including 'improved and faster procedures',<sup>21</sup> designed to enforce the 'principles of fair sharing of responsibility and solidarity'.<sup>22</sup> Although a staff working document accompanied the new pact,<sup>23</sup> no ex-ante Impact Assessment examining alternative options was presented by the Commission.

In the **staff working document, SWD (2020) 207**, the Commission identified the following practical challenges and realities as existing under the CEAS:

- A high and increasing ratio of asylum applications to irregular arrivals,<sup>24</sup> posing a large administrative load and excruciating waiting periods for asylum-seeking individuals;
- Strong pressures on certain national asylum systems due to the current Dublin system;
- Large shares of migrants from Search and Rescue (SAR) operations,<sup>25</sup> decreasing the effectiveness of the integrated border management;
- A substantial discrepancy between the number of irregularly present third-country nationals to the share of these people who return, either voluntarily or forcibly, to their home countries.<sup>26</sup>

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<sup>19</sup> [Report](#) on the fact-finding investigation on Frontex concerning alleged fundamental rights Violations, LIBE Committee, European Parliament, 2021.

<sup>20</sup> A fresh start on migration: 'Building confidence and striking a new balance between responsibility and solidarity, press release, IP/20/1706, European Commission, September 2020.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> [SWD\(2020\) 207](#).

<sup>24</sup> The Staff Working Document SWD(2020) 207 states: 'while there were 1,2 million first-time asylum seekers applying for international protection in the EU and 374,314 registered irregular border crossings on the three main routes in 2016, there were 612,685 first-time asylum seekers applying for international protection and 124,023 registered irregular border crossings in 2019'.

<sup>25</sup> 'In the EU context, [an [S&R operation](#) refers to an] operation of EU Member States to render assistance to any vessel or person in distress at sea regardless of the nationality or status of such a person or the circumstances in which that person is found in accordance with international law and respect for fundamental rights.'

<sup>26</sup> In addition, the Commission's 'hotspot approach', which allows EASO, Frontex, Europol and Eurojust to work on the ground with the authorities of frontline Member States facing disproportionate migratory pressures, entailed difficulties that are acknowledged in the Commission's Staff Working Document. The 'hotspot' approach refers to an 'approach where the European Asylum Support Office (EASO), the European Border and Coast Guard Agency (Frontex), Europol and Eurojust work on the ground with the authorities of frontline EU Member States which are facing disproportionate migratory pressures at the EU's external borders to help to fulfil their obligations under EU

The new pact aims 'to integrate the internal and external dimensions of migration policies'<sup>27</sup> whilst outlining a roadmap for future migration policies and practices across the EU. In doing so, the new pact is composed of **five legal instruments, three recommendations and one guidance document**, namely: 1) A new screening regulation<sup>28</sup>; 2) An amended proposal revising the Asylum Procedures Regulation<sup>29</sup>; 3) An amended proposal revising the Eurodac Regulation;<sup>30</sup> 4) A new asylum and migration management regulation;<sup>31</sup> 5) A new crisis and force majeure regulation;<sup>32</sup> 6) A new migration preparedness and crisis blueprint;<sup>33</sup> 7) A new recommendation on resettlement and complementary pathways;<sup>34</sup> 8) A new recommendation on search and rescue operations by private vessels;<sup>35</sup> 9) New guidance on the Facilitators Directive.<sup>36</sup>

Finally, the pact has four main building block. It introduces 1) changes to **pre-entry procedures** at external borders and 2) novel **mechanisms for responsibility sharing and solidarity**. In addition, it introduces 3) a special **mechanism for crisis and force majeure** and 4) some novel elements to the **governance mechanism** in the area of asylum and immigration. A detailed analysis of the main elements of the respective proposals set forth in the new pact is presented in **Chapter 5** of this study.

### 1.3. Objective of the study

When presenting the new pact on migration and asylum after intensive consultation with EU Member States and the European Parliament, the Commission submitted an accompanying staff working document.<sup>37</sup> However, the new pact was not supported by an impact assessment (IA) in line with the Commission's commitments under the 2016 Interinstitutional Agreement on Better Law-Making (IIA BLM).<sup>38</sup> The new pact is a Commission Work Programme initiative, and as such, should, as a rule, be accompanied by such an assessment.

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law and swiftly identify, register and fingerprint incoming migrants.' [Hotspot approach](#), European Commission website.

<sup>27</sup> New Pact on Migration and Asylum: Questions and Answers, European Commission [website](#).

<sup>28</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, [COM\(2020\)612](#) final.

<sup>29</sup> Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, [COM\(2020\)611](#) final.

<sup>30</sup> [COM\(2020\)611](#) final.

<sup>31</sup> [COM\(2020\)611](#) final.

<sup>32</sup> [COM/2020/613](#) final.

<sup>33</sup> [Commission Recommendation \(EU\) 2020/1366 of 23 September 2020](#) on an EU mechanism for preparedness and management of crises related to migration C/2020/6469.

<sup>34</sup> [Commission Recommendation \(EU\) 2020/1364 of 23 September 2020](#) on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways C/2020/6467.

<sup>35</sup> [Commission Recommendation \(EU\) 2020/1365 of 23 September 2020](#) on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities C/2020/6468.

<sup>36</sup> New Pact on Migration and Asylum: Questions and Answers. [European Commission website](#).

<sup>37</sup> European Commission, '[COMMISSION STAFF WORKING DOCUMENT Accompanying the document PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on asylum and migration management and amending Council Directive \(EC\)2003/109 and the proposed Regulation \(EU\)XXX/XXX \[Asylum and Migration Fund\] SWD/2020/207 final](#)', Brussels, 23.9.2020.

<sup>38</sup> European Parliament, the Council of the European Union and the European Commission, '[INTERINSTITUTIONAL AGREEMENT BETWEEN THE EUROPEAN PARLIAMENT, THE COUNCIL OF THE EUROPEAN UNION AND THE EUROPEAN](#)

According to the 2016 Interinstitutional Agreement on Better Law-Making, initiatives that are expected to have significant social, economic or environmental impacts should be accompanied by IAs.<sup>39</sup> IAs should 'cover the existence, scale and consequences of a problem and the question whether or not Union action is needed. They should map out alternative solutions and, where possible, potential short and long-term costs and benefits, assessing the economic, environmental and social impacts in an integrated and balanced way and using both qualitative and quantitative analyses. The principles of subsidiarity and proportionality should be fully respected, as should fundamental rights.'<sup>40</sup> In line with the Commission's 2017 Better Regulation Guidelines, the IA process is about gathering and analysing evidence to support policymaking.<sup>41</sup>

Members of the European Parliament's LIBE Committee criticised the fact that the new pact was presented without a Commission IA. They called for more factual information and an assessment of whether the Commission's proposals under the new pact would remedy the existing problems in practice. Against this background, the LIBE Committee decided to request a horizontal substitute impact assessment with the European Parliamentary Research Service (EPRS).

Therefore this study focusses on the main proposed changes of the Commission's new pact on migration and asylum, with a particular focus on the following four proposals:

- 1) asylum and migration management regulation (RAMM), COM(2020) 610 final;
- 2) crisis and force majeure regulation, COM(2020) 613 final;
- 3) Amended Asylum Procedure Regulation (APR), COM(2020) 611 final;
- 4) Screening regulation, COM(2020) 612 final.

It assesses 'the system' and underlying logic of the proposed new pact with the aim to analyse how the four Commission proposals would work and interact in practice. The study also assesses whether and to what extent the proposed new pact addresses the identified shortcomings and implementation problems (see Section 3.2) of the current EU asylum and migration law and policy. Finally, it identifies and assesses the expected impacts of the proposed new pact, notably the economic, social, and territorial impacts as well as the impact on fundamental rights, when compared to a continuation of the status quo (current situation). It should be noted that this study does not assess different alternative options, which an impact assessment would typically do (see Section 1.4. methodology).<sup>42</sup>

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[COMMISSION ON BETTER LAW-MAKING INTERINSTITUTIONAL AGREEMENT of 13 April 2016 on Better Law-Making](#), Official Journal of the European Union, 12.5.2016.

<sup>39</sup> [2016 Interinstitutional Agreement on Better Law-Making](#), OJ L 123/1, 12.5.2016, para. 13.

<sup>40</sup> [2016 Interinstitutional Agreement on Better Law-Making](#), OJ L 123/1, 12.5.2016, para. 12.

<sup>41</sup> The EP has criticised the lack of Commission IAs for major legislative proposals in its report on the interpretation and implementation of the Interinstitutional Agreement on Better Law-Making of 15 May 2018, see: European Parliament, 'Report on the interpretation and implementation of the Interinstitutional Agreement on Better Law-Making (2016/2018(INI))', rapporteurs Pavel Svoboda and Richard Corbett (15 May 2018), para. 22. Many proposals that concern migration and asylum have been presented by the Commission without impact assessments in recent years. For some of such proposals the European Parliamentary Research Service (EPRS) conducted targeted substitute impact assessments, see, for example, EPRS, [The proposed Return Directive \(recast\) – Substitute Impact Assessment](#), 2019; EPRS, [The European Commission package of ETIAS consequential amendments - Substitute Impact Assessment](#), 2019; see also EPRS, [Commission proposal on the temporary derogation from the e-Privacy Directive for the purpose of fighting online child sexual abuse - Substitute Impact Assessment](#), 2021.

<sup>42</sup> This is mainly due to time constraints. This horizontal substitute IA was conducted in three months' time. By comparison, it takes the Commission typically one to two years to carry out a fully-fledged impact assessment.

Figure 1.3:1 – A brief summary of the new pact on migration



Source: 89 Initiative. [The new pact on migration and asylum A Brief Summary and Next Steps](#), Key Facts and Figures, p. 1.

### 1.3.1. Previous reform attempts of the Common European Asylum System

In response to the increasing migration numbers to the EU in 2015 and 2016, Member States resorted to national measures in order to deal with the increase in arrivals. These measures later came to include the reinstatement of controls at the internal Schengen borders and restricting access to asylum, which undermined the Schengen and Dublin systems.<sup>43</sup> The Commission reacted within a very short time with 'an avalanche of legislative proposals and ad hoc measures'.<sup>44</sup> Many of these proposals were justified by the idea that the large number of migrants and asylum seekers arriving in the EU in 2015 exposed 'weaknesses in the design and implementation of the system, and of the 'Dublin' arrangements in particular'.<sup>45</sup> However, these novel proposals were developed before the Commission had the time to evaluate the Common European Asylum System (CEAS).<sup>46</sup>

On May 15, 2015, the European Commission presented its **European Agenda on Migration** with the aim to formulate adequate policy responses to arrivals of migrants to the EU.<sup>47</sup> The Agenda included both emergency actions and strategic priorities that set out EU action from 2014/2015 to 2020.<sup>48</sup> The Commission proposed to trigger the emergency response mechanism provided for in

<sup>43</sup> The **Schengen system** refers to the EU passport-free zone that covers most of the European countries. It is the largest free travel area in the world. The **Dublin system** is a European Union mechanism that assists in determining which country is responsible for processing an asylum application from a non-EU country or a stateless individual. The law specifies which country will process an asylum application submitted under the Geneva Convention. The Dublin system comprises 27 signatories, including the EU's 27 Member States. When a migrant applies for asylum, officials take his fingerprints and record his basic details. Officials weigh a number of factors when determining who is responsible for asylum. Family concerns, recent possession of a visa or residency permit from a member state, and whether an applicant joined the EU legally or illegally are among them.

<sup>44</sup> European Parliament, The Implementation of the Common European Asylum System, 2016, p.6.

<sup>45</sup> Communication from the Commission to the European Parliament and the Council toward a reform of the Common European Asylum System and enhancing legal avenues to Europe, COM(2016) 197 final, p.3.

<sup>46</sup> Migration Pact Impact Assessment interview with DG Migration and Home Affairs, Ecorys, 2021

<sup>47</sup> Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A European Agenda on Migration, COM(2015) 240.

<sup>48</sup> COM(2015) 240.

Article 78(3) of the Treaty on the Functioning of the European Union (TFEU) and introduced a temporary European relocation scheme for asylum seekers in clear need of international protection.

The proposed **relocation plan** was followed by two Council decisions that provided for the relocation of 160,000 migrants from Greece and Italy – the two countries whose geographical position made them the main entry points on the Eastern and Central Mediterranean routes, respectively – over a two-year period.<sup>49</sup> However, both emergency relocation mechanisms experienced a number of operational challenges that hampered their implementation. Challenges included, inter alia Slovakia's and Hungary's stance to take legal action against the EU proposal, as well as effective obstruction from a number of Member States leading to an unsuccessful annulment action and consecutive infringement proceedings against the Member States concerned.<sup>50</sup>

In 2016, the Commission launched an overall reform of the CEAS to achieve further harmonisation of the EU asylum acquis.<sup>51</sup> The Commission underlined the need to address weaknesses in the design and implementation of the CEAS, particularly the Dublin III Regulation.<sup>52</sup> The reform aimed to address the varying recognition rates of asylum seekers between EU Member States and differing standards concerning aspects of national asylum systems procedures, such as the length of asylum procedures and reception conditions for asylum seekers. In addition, in March 2016, the EU-Turkey Statement was put forward as a reactionary instrument to deal with the high level of irregular migration flows to the EU, outlining various measures for greater cooperation between the EU and Turkey in this area. Specifically, the EU and Turkey agreed that 'all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 [would] be returned to Turkey,' including migrants who applied for asylum or whose applications was determined to be unfounded or inadmissible.<sup>53</sup>

On 4 May 2016, the Commission presented a **first package of proposals**<sup>54</sup> for a reform of CEAS and subsequently presented a **second package of reform proposals** on 13 July 2016.<sup>55</sup>

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<sup>49</sup> Council Decision (EU) [2015/1523](#) of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece.

<sup>50</sup> Sciences Po: [How Poland and Hungary were put in a minority position on the relocation of refugees](#) (2015-2019).

<sup>51</sup> COM(2016) 197.

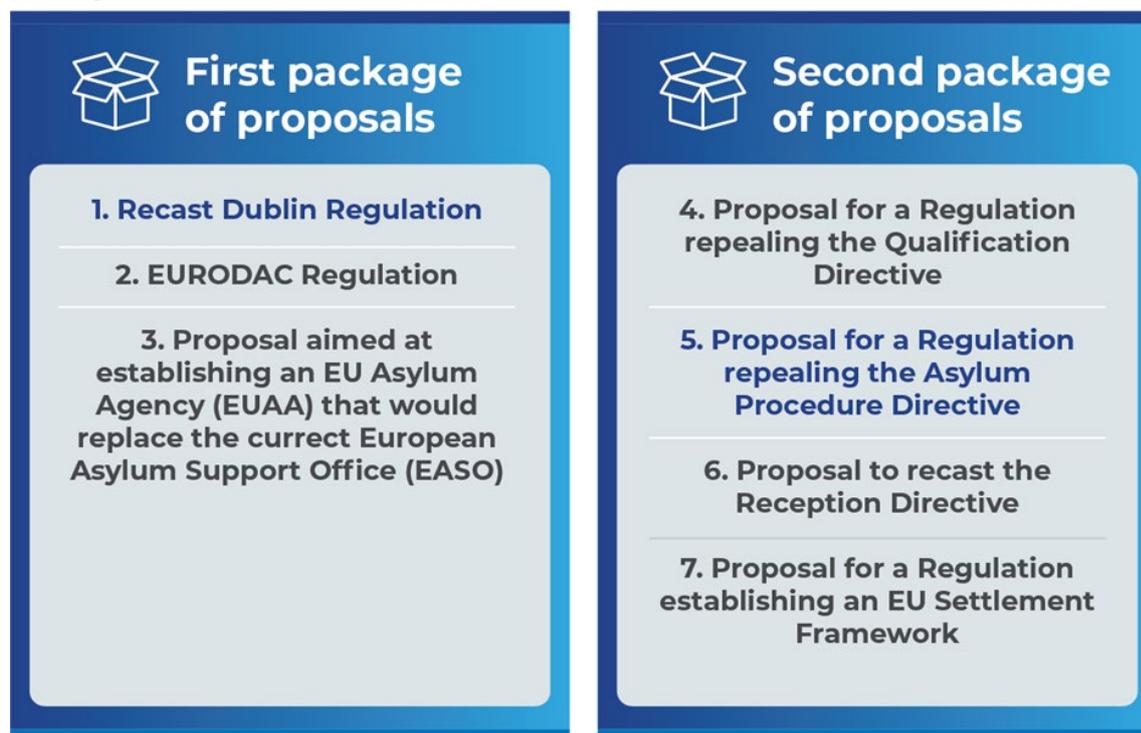
<sup>52</sup> COM(2016) 270.

<sup>53</sup> [Press release](#) on the EU-Turkey statement, European Commission, 18 March 2016.

<sup>54</sup> [COM\(2016\) 270](#) final; COM(2016) 272 final; COM(2016) 271 final.

<sup>55</sup> COM(2016) 466; COM(2016)467; COM(2016)468; Legislative train schedule towards a new policy on migration, Reform of the Common European Asylum System (CEAS), European Parliament [website](#); COM(2016)465.

Figure 1.3:2 – The 2016 Common European Asylum System (CEAS) reform proposal packages



Note: an agreement was not reached on the Recast Dublin Regulation and Proposal for a Regulation repealing the Asylum Procedure Directive, highlighted in blue.

Source: Ecorys, 2021.

During the 2014-2019 legislative term, provisional agreements among EU co-legislators – the EP and the Council of the EU – were reached on five of the proposed legislative files: the proposed Qualification Regulation<sup>56</sup>; the Reception Conditions Directive<sup>57</sup>; the Union Resettlement Framework Regulation<sup>58</sup>; the EURODAC Regulation<sup>59</sup>; and the EU Agency for Asylum<sup>60</sup>. However, EU co-legislators did not reach an agreement on two of the Commission's legislative proposals, namely the **recast of the Dublin III Regulation** and the **Asylum Procedures Regulation**. This was mainly due to **diverging preferences between EU Member States** in the Council, leading to political deadlock.

The main elements of the two legislative proposals and a summary of the key issues surrounding their negotiation are presented in the following two sub-sections.

### 1.3.2. Reform of the Dublin III system

One of the most contentious issues surrounding the reform of the **Dublin Regulation** concerned the proposed measures on solidarity and fair sharing of responsibility. The Dublin Regulation determines which country is responsible for examining an asylum application. In most cases, this is

<sup>56</sup> [COM\(2016\) 466](#) final.

<sup>57</sup> [COM\(2016\) 465](#) final.

<sup>58</sup> [COM\(2016\) 467](#) final.

<sup>59</sup> [COM\(2016\) 272](#) final.

<sup>60</sup> [COM\(2016\) 271](#) final.

the country where an asylum seeker first enters the EU.<sup>61</sup> While not including substantial changes in the existing criteria for determining which EU country is responsible for examining an asylum application, the Commission proposed to streamline and supplement the Dublin system with a corrective allocation mechanism (the so-called 'fairness mechanism').

The proposed mechanism would be triggered automatically when an EU Member State was faced with disproportionate pressure based on a reference key.<sup>62</sup> The reference key consisted of two criteria: the size of the population (50 %); and the total Gross Domestic Product (50 %).<sup>63</sup> It included the number of applications for international protection for which a Member State was responsible, plus the number of refugees it resettled, exceeding 150 % of the figure identified in the reference key.<sup>64</sup> As a consequence, all new applications lodged in the Member States experiencing the disproportionate pressure would be allocated to those Member States with a number of applications below the number identified in the reference key. However, the **mandatory relocation requirement**<sup>65</sup> was met with opposition by a group of Member States, who jointly declared their principled stance against any kind of compulsory redistribution mechanism at an EU level.<sup>66</sup>

### Negotiations in the European Parliament and Council

The LIBE Committee adopted its position regarding the proposed reform of the Dublin Regulation in the autumn of 2017. Cecilia Wikström, the rapporteur for this file, stated: '*The European Parliament will only sign off on reforms of the Dublin Regulation that change the situation on the ground [...]. Any new Dublin system must include an automatic relocation system, with the full participation of all Member States, as well as fostering true solidarity between all Member States.*'<sup>67</sup> On 6 November 2017, the European Parliament confirmed a mandate for interinstitutional negotiations with the Council.

Following several attempts to find a compromise agreement within the Council, the EU Member States were unable to find a common Dublin reform approach.<sup>68</sup>

### 1.3.3. Reform of the Asylum Procedures

In 2016, the Commission additionally presented a proposal for an **asylum procedures regulation (APR)**. This procedure aimed to establish a common, fair and efficient procedure for international protection in the EU while removing incentives for secondary movements between Member States.<sup>69</sup> In the current **Asylum Procedures Directive (APD)**, the main goal is to provide every

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<sup>61</sup> The European Parliament and the Council of the European Union, '[REGULATION \(EU\) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person \(recast\)](#)', Official Journal of the European Union, 29.6.2013.

<sup>62</sup> Anja Radjenovic, Briefing on the Reform of the Dublin System, EPRS, European Parliament, March 2019.

<sup>63</sup> Proposed Regulation, Art.35. [COM\(2020\) 610](#) final.

<sup>64</sup> Proposed Regulation, Art.34.2. [COM\(2020\) 610](#) final.

<sup>65</sup> [Council Decision \(EU\) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece](#), Document 32015D160.

<sup>66</sup> European Parliament, '[MEPs give go-ahead to relocate an additional 120.000 asylum seekers in the EU](#)', Press Release, 16.09.2015.

<sup>67</sup> Wikström, C., European Parliament, 'Plenary Sitting: REPORT on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (COM(2016)0270 – C8-0173/2016 – 2016/0133(COD))', Committee on Civil Liberties, Justice and Home Affairs, A8-0345/2017, 6 November 2017.

<sup>68</sup> Note on New Dublin: reversing the dynamics, 7674/1, Council of the European Union, April 2018.

<sup>69</sup> European Commission, '[New Pact on Migration and Asylum](#)', Webpage.

person in need of international protection with a legally sound and efficient procedure, as well as an individual review of their claim based on the same criteria.<sup>70</sup> Border procedures<sup>71</sup> are permitted under Article 43 of the APD: *'When applications for international protection are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant, Member States can provide for admissibility and/or substantive examination procedures at these locations. Furthermore, the directive allows for the possibility to apply border procedures in transit zones or proximity to borders in the event of large numbers of arrivals.'*<sup>72</sup>

The proposal for a new APR would replace the APD with a regulation establishing a fully harmonised common EU procedure for international protection to reduce differences in recognition rates from one Member State to the next, discourage secondary movements and ensure common effective procedural guarantees for asylum seekers.<sup>73</sup> Negotiations regarding the Commission proposal proved contentious within the Council. In particular, Article 41 of the proposed regulation concerning the border procedure proved to be controversial on several grounds, the most divisive being whether the application of the border procedure should be optional or mandatory.<sup>74</sup>

Due to the lack of agreement reached in the Council, significant asylum- and migration-related problems were left unaddressed. At this time, the EP had already reached a mandate on the previous Dublin III proposal<sup>75</sup>, the APR<sup>76</sup>, the Recast European Dactyloscopy (EURODAC) Regulation, and twelve chapters of the Regulation on the Future European Union Asylum Agency.<sup>77</sup>

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<sup>70</sup> Legislative train schedule towards a new policy on migration, Reform of the Common European Asylum System (CEAS), European Parliament [website](#).

<sup>71</sup> A border procedure may be applied where the applicant makes an application directly at the designated border areas or transit zones after being apprehended for evading or attempting to evade controls.

<sup>72</sup> Van Ballegooij, W., et al., 'Asylum Procedures at the border: European implementation assessment. '; European Parliament, European Parliamentary Research Service, & Ex-Post Evaluation Unit 2020.

<sup>73</sup> Legislative train schedule towards a new policy on migration, Reform of the Common European Asylum System (CEAS), European Parliament [website](#).

<sup>74</sup> Note on Border Procedures, 13376/18, Council of the European Union, October 2018. Kris Pollet, 'All in vain? The fate of EP positions on asylum reform after the European elections', EU Immigration and Asylum Law and Policy blog, 23 May 2019.

<sup>75</sup> European Commission. [Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanism for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person \(recast\)](#). COM(2016) 270 final, Brussels, 4. May 2016.

<sup>76</sup> [European Commission. Amended Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU](#). COM(2020) 611 final. Brussels, 23. September 2020.

<sup>77</sup> European Parliament and the Council. [Regulation \(EU\) No 603/2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation \(EU\) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation \(EU\) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice \(recast\)](#). Official Journal of the European Union. 29 May 2013.

## 1.4. Methodology

This **IA was prepared in a very limited time frame** from mid-April to mid-July 2021 with the objective of feeding into the legislative process.

The IA took into account the **IA methodology** as described in the Commission's 2017 Better Regulation Guidelines and the corresponding relevant parts of the Better Regulation Toolbox.<sup>78</sup> **This IA differs from a standard Commission IA due to the fact that this study was carried out after the legislative proposal for the new pact was produced.**

Moreover, in the Commission staff working document accompanying the new pact, the Commission does not provide an assessment of alternative policy options, as is standard practice in an IA. As a result, the present IA study is unable to assess the relative effectiveness of the proposed new pact against alternative options. It is also not known whether the Commission considered other policy options that, in the end, were discarded. The only comparison that can be made is between the current situation and the proposed new pact. Finally, it is to be noted that the SWD does not present any assessment of the expected impacts of the proposed measures.

**In this context, the study was commissioned with two main objectives:** (1) to review and critically assess the underlying logic of the Commission's proposal; and (2) to assess the potential results (impacts) of the new legislation. This IA provides a quantitative and qualitative assessment of the impacts of the new pact. The pact has four main building blocks. It introduces new **pre-entry procedures** at external borders and novel **mechanisms for responsibility sharing and solidarity**. In addition, it introduces a special **mechanism for crisis and force majeure** and some novel elements to the **governance mechanism** in the area of asylum and immigration. This study centres around these four elements.

For this study we conducted **extensive desk research and document and literature review** of recently published studies (see References) for the purpose of the assessment. Information derived from these sources was complemented with a series of **stakeholder consultations**. The stakeholder consultations consisted of over **30 interviews with stakeholders relevant to and affected by the new pact** of approximately 30 minutes to an hour each, conducted remotely, and an additional **15 written inputs** from a range of relevant experts, including representatives of the Commission and EU agencies (including the European Asylum Support Office (EASO), the European Border and Coast Guard Agency (Frontex) and the Fundamental Rights Agency (FRA), migration and asylum practitioners, EU Member States government representatives and advisors from EU Member States, civil society, think tanks and NGOs (see annex A for a list of consulted stakeholders). Questionnaires, drafted by the study team in collaboration with legal experts, were sent to all stakeholders prior to their online consultations. The interviews were semi-structured.<sup>79</sup>

To allow for an in-depth analysis of the experience and expected impacts in different Member States, our team conducted **country-level research in a selection of Member States**, namely Germany, Italy, Spain, Sweden, Poland and Greece (see annex B). The selection is based on geographical balance, representation of 'frontline' and 'core' Member States, and differences in the number of arrivals of migrants and asylum seekers. The country-level research provides for an in-depth analysis of the experiences of and expected impacts on the national level. The input of this exercise fed into the definition of the baseline and the analysis of the impacts. The country research subsequently

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<sup>78</sup> European Commission, 2017 Better Regulation Guidelines, SWD(2017) 350, 7 July 2017.

<sup>79</sup> Semi-structured means that the stakeholders were encouraged to speak freely and come with further insights beyond the content that was directly covered by the above-noted questionnaire. Prior to each interview, stakeholders were asked for consent to use their input and were made aware of their right to anonymity.

built a solid base for the IA by functioning as a source of national-level data on the impact that the new pact stood to have along the social, economic, territorial and fundamental rights dimensions. The gathered information from the document analysis and the conducted interviews with government and NGO stakeholders focused on answering relevant questions on the current asylum system, CEAS, and the proposed new pact on migration.

The **legal analysis** of the new pact is based on desk research, complemented by the data obtained through interviews with stakeholders (NGOs, government representatives and EU officials). The desk research draws from international and EU-level legal sources, including case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR); reports and studies by the European Parliament and the Commission, and; other relevant reports and data, including from the selected Member States for country-level research.

For the **economic analysis**, information on costs and the number of affected entities by the proposed measures (includes migrants and asylum seekers, competent government authorities, etc.) was collected through migration reports, statistics and literature, and stakeholder consultation. Numbers were cross-checked between sources, and the underlying definitions were thoroughly examined. A Standard Cost Model (SCM) is used in which costs are assessed on the basis of the effects per migrant/asylum seeker multiplied by the estimated total number of affected migrants. Where data is lacking, a qualitative assessment was made to the extent possible. The stakeholder consultation complemented the data and allowed for the development of a more focused analysis through expert insights.

Atlas.ti software was used to ensure a structured and consistent assessment of the qualitative data and information collected via the document review and stakeholder consultations.<sup>80</sup> The information was coded on previously developed indicators (annex E).

All the proposed measures of the new pact were judged against the **four impact dimensions (economic, territorial, social and fundamental rights)** set out in the Terms of Reference for this impact assessment. To this end, the indicators have been grouped accordingly and clustered into the different phases of an asylum procedure (pre-arrival, screening, solidarity and relocation mechanism, integration, return). The coding sheet and the subsequent summary table of the assessed texts provide an extensive overview of the potential impacts of the four proposals.

Concerning the limitations of this study, first and foremost it is important to highlight the **complexity** of the study as it examined four different proposals and their impacts, and combined the analysis into one single horizontal impact assessment. This, in combination with the limited overall timeline and resources available for this IA affected the scope of research and analysis, as well as the data gathering process. More concretely, our team was confronted with **limited available quantitative data** on the national level, particularly on the reception infrastructure and secondary movements. Further, Member States provided limited insight into the economic impact assessment for a number of reasons, such as the short timeframe of the study, the limited capacities to respond to information requests, or lack of available data about the current situation versus the new pact. As a result, mostly data on migration trends (number of arrivals, asylum applications, returns) was taken from Eurostat. This was compensated with qualitative sources, such as reports from NGOs and Human Rights bodies, UNHCR, and academia. Further, accessibility to stakeholders

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<sup>80</sup> Atlas.ti is a workbench for the structured analysis of large amounts of qualitative, textual, graphical, audio and other data, which allows to systematically code and develop a system of meaning that unlocks a specific research subject. It offers a set of tools and features that are powerful and flexible enough to get to the bottom of even the most complex data material. The central workspace in Atlas.ti serves as a container for the project's data. Coding can be done by simply dragging codes onto the selected piece of data. Object Managers, the Project Explorer, and the Co-occurrence Explorer let you browse and navigate through your project data. Atlas.ti website: <https://atlasti.com/>.

within the timeframe of the study risked the selection of a **bias sample**. In order to mitigate this, our team assessed each individual response to better understand the motives behind stakeholder's perceptions. In addition, we applied quality assurance, in which documents and stakeholders were selected using objective indicators. This process enabled us to gather inputs from various stakeholders with divergent opinions on the matter. To counter availability bias resulting in a disproportionately reliance on the most readily available data, we resorted to follow-up interviews with the consulted stakeholders. This process led to more clarity and additional document resources, which enriched the final data-set.

## 2. Definition of the problems and baseline

### Key findings

- The identification of problems and their underlying drivers in the SWD accompanying the new pact lacks clarity. Problems are formulated without a clear and objective identification of the main drivers behind them. The proposed policy solutions are anticipated rather than derived from a clear evidence base;
- Existing evidence suggests that discrepancies in actual access to protection for asylum seekers depend on widespread procedural inefficiencies and on gaps in the quality of the reception offered. Instead, the Commission's analysis focuses on the lack of harmonised screening and border procedures;
- Existing evidence suggests that an effective and sustainable return policy largely depends on the capacity to incentivise the cooperation of returnees and of third countries of return. Instead, the Commission's analysis focuses on the weak link between the asylum and the return process;
- Existing evidence suggests that the failures of previous attempts to establish solidarity mechanisms are mainly due to the lack of a common understanding of the scope and content of the principle of solidarity and fair sharing of responsibility. Rather than offering a critical discussion on a possible methodology for defining redistributive targets of solidarity exercises, the Commission's analysis focuses on the absence of legal tools to offer solidarity beyond relocation;
- While the majority of the evaluations carried out on the functioning of the Dublin system conclude that the main problems lie in the overall design of the system (in particular with regard to the prevalence of the first country of irregular entry criterion and the lack of consideration for the preferences of asylum seekers in the determination of the Member State responsible), in the SWD, the focus is placed on implementation shortcomings. In particular, 'procedural loopholes' incentivising unauthorised secondary movements are considered to be the main problem;
- In the SWD, no evidence is provided which would justify the need to complement the existing tools with a new crisis management mechanism.

### 2.1. Introduction

In the SWD accompanying the new pact,<sup>81</sup> the Commission highlights what it considers as the main challenges and their underlying drivers within the current migration framework.

This chapter critically assesses the identified problems and their underlying drivers as presented in the Commission's SWD.<sup>82</sup> At the end of the chapter, the study team also attempts to identify the most pressing problems of the current migration framework through a critical review. The analysis is based on a thorough document review and interviews with key experts which have been conducted as part of this study.

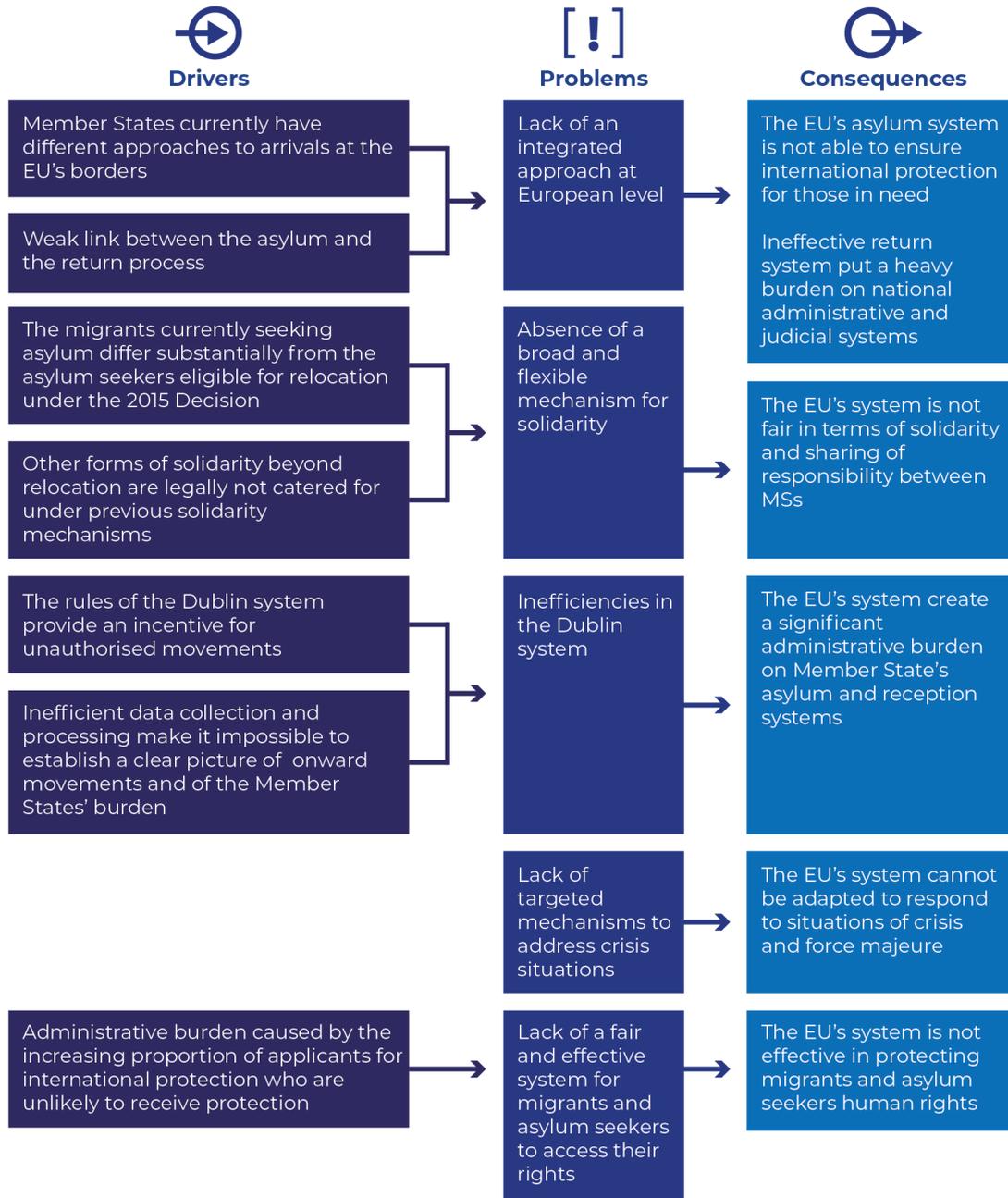
The study team presents two different problem trees. The first depicts the main problems, their underlying drivers and consequences of the identified problems as presented by the Commission

<sup>81</sup> [SWD\(2020\) 207](#).

<sup>82</sup> While the Commission uses the terms 'challenges' and 'problems' somewhat inconsistently throughout the text, the research team adopts the standard impact assessment terminology and consistently refers to problems instead of challenges.

in the SWD (Figure 2.1:1). The second presents a revised problem tree based on the findings of a critical review of problems by the research team (Figure 2.4:1).

Figure 2.1:1 – Problem tree as presented by the Commission



Source: Ecorys, 2021.

## 2.2. Review of the problems as identified by the European Commission

### 2.2.1. The lack of an integrated approach at European level

The **first problem** identified by the Commission is the **lack of an integrated approach at the EU level**. According to the Commission, the Member States' asylum and return systems continue to operate mostly separately. This is despite the significant efforts and investments aimed at harmonising these systems, including through increased technical and financial support provided to Member States by the EU.<sup>83</sup> This issue has also been highlighted by various interviewees, including representatives from the Swedish government and representatives from civil society in Italy, who noted that a lack of harmonization between Member State approaches to migration and asylum continues to be present in the current system.<sup>84</sup>

The first problem has two more specific dimensions, which the Commission highlights in the SWD.

The first dimension is the **lack of harmonised screening and border procedures** to effectively manage incoming third-country nationals (TCNs) at the border and streamlining the examination of applications for international protection lodged by nationals of third countries with a low recognition rate.<sup>85</sup> In particular, the EU lacks a uniform system to carry out health, security and identity checks to ensure quick identification of those with clear protection needs. In a context characterised by what the Commission calls 'mixed' arrivals of persons of nationalities with divergent recognition rates, this is likely to result in increased administrative burdens and delays in accessing asylum.<sup>86</sup> According to the Commission, many TCNs whose application could be quickly decided at the border are admitted to the territory of Member States despite not fulfilling the conditions for entry. This issue has also been flagged by various civil society organisations when interviewed. Representatives from IOM Greece noted that the most pressing challenges in Greece's approach to migration and asylum is an incapacity to process large inflows of migrants; lengthy, time-consuming processes during the screening and border procedures; and a lack of cultural mediators and interpreters to identify and accurately deal with vulnerable groups, especially at land borders.<sup>87</sup>

The second dimension of the above-noted problem is the **ineffective return policy for migrants who have an irregular status**. Readmission agreements with third countries are not used to their full potential by Member States. In many cases, this is in part due to a lack of willingness and/or capacity on the part of third countries to cooperate with Member States on the readmission of their own nationals. The use of assisted voluntary return programmes remains limited.<sup>88</sup> The Commission

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<sup>83</sup> [SWD\(2020\) 207](#), p. 5 and 41.

<sup>84</sup> Migration Pact Impact Assessment Country research for Sweden on the basis of desk research and interviews with the Swedish Ministry of Justice, the Swedish Migration Agency and the Swedish Refugee Law Centre, Ecorys, 2021; Migration Pact Impact Assessment Country Research Italy, Ecorys, 2021.

<sup>85</sup> [SWD\(2020\) 207](#), p. 47 and 50.

<sup>86</sup> [SWD\(2020\) 207](#), p. 48.

<sup>87</sup> Migration Pact Impact Assessment Country research for Greece on the basis of desk research and interviews with IOM Greece and the Greek Ministry of Migration and Asylum, Ecorys, 2021.

<sup>88</sup> [SWD\(2020\) 207](#), p. 46.

specifically identifies the existing weak link between the asylum and the return processes as a key reason for the ineffectiveness of the return policy.<sup>89</sup>

According to the Commission, around 80 per cent of the total number of return decisions issued every year concern TCNs whose application has been rejected. These individuals should be quickly channelled into the return procedure in the view of the Commission.<sup>90</sup> However, there are many 'procedural and legal loopholes'<sup>91</sup> that prevent the return of irregular migrants.

In particular, the Commission highlights that because asylum and return decisions are issued in separate acts, it multiplies the opportunities for TCNs to delay their return by using the separate judicial remedies available under the asylum and the return procedures. Also, TCNs have the possibility to suspend their return by lodging a subsequent asylum application,<sup>92</sup> often causing the interruption of the process when Member States have already arranged all of the details pertaining to the removal.

### Critical reflection on the first dimension of the identified problem (asylum)

In relation to the first dimension, the Commission seems to mix implementation and harmonization problems, while at the same time anticipating the policy solution under the guise of a discussion on the main drivers of the problem.

In its assessment, the Commission recognises that the widespread inefficiencies in the procedures and the gaps in the quality of the reception offered may result in discrepancies in the actual access to rights for asylum seekers.<sup>93</sup> However, the Commission suggests that main cause for the discrepancy in the actual protection offered by national asylum systems is the lack of harmonization. In particular, it indicates that in a context characterized by the changing 'nature and composition of the flows',<sup>94</sup> the main problem lies in the lack of a common procedure to ensure the identification of those presenting clear protection needs at the early stage of the asylum process. The Commission points to the increased 'mixed' nature of migratory flows, suggesting that the share of TCNs with clear protection needs has steadily decreased since 2016. According to the Commission, this is demonstrated by the growth in the percentage of first-time asylum applicants originating from countries with a recognition rate lower than 25%.<sup>95</sup>

The way in which the Commission calculates and uses the asylum recognition rate to assess TCNs' protection needs should, however, methodologically be treated with caution. First, in calculating the recognition rate, the Commission does not include people who have been granted protection for humanitarian reasons.<sup>96</sup> This stands in contrast to the approach used by European Asylum

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<sup>89</sup> [SWD\(2020\) 207](#), p. 42, Trauner, F. and Stutz, P. [The EU's 'return rate' with third countries: Why EU readmission agreements do not make much difference](#). International Migration. 2021.

<sup>90</sup> [SWD\(2020\) 207](#), p. 43.

<sup>91</sup> [SWD\(2020\) 207](#), p. 43.

<sup>92</sup> A subsequent application is an application for international protection presented after the issuance of a return decision.

<sup>93</sup> [SWD\(2020\) 207](#), p. 5 and 42.

<sup>94</sup> [SWD\(2020\) 207](#), p. 42.

<sup>95</sup> [SWD\(2020\) 207](#), p. 20.

<sup>96</sup> In the SWD it is said that recognition rate 'is meant as the share of positive decisions at first instance resulting in the granting of refugee status or subsidiary protection status over the total number of asylum decisions at first instance.' ([SWD\(2020\) 207](#), p. 20, footnote n. 17).

Support Office (EASO) in its 2020 report on asylum in EU.<sup>97</sup> In the SWD, the Commission underlines that the recognition rate fell to 30 % in 2019 compared to the 56 % in 2016.<sup>98</sup> However, if one factors in all types of positive decisions, it is evident that the calculation underestimates the recognition rate by at least 8 percentage points (see Table 2.0-1).

Table 2.0-1: First instance decisions on applications in the EU (2015-2019)

First instance decisions on applications (2015-2019)										
	2015		2016		2017		2018		2019	
Total decisions	558.590	100 %	1.075.490	100 %	933.780	100 %	552.900	100 %	540.830	100 %
Positive decisions	293.700	53 %	662.955	62 %	428.985	46 %	207.325	37 %	206.025	38 %
Rejected	264.890	47 %	412.530	38 %	504.800	54 %	345.575	63 %	334.805	62 %

Source: Eurostat European Union – 27 countries.

Second, the Commission does not consider that a significant number of negative decisions are then successfully challenged on appeal. If second instance decisions were also included in the calculation, the overall recognition rate would likely be higher. EUROSTAT specifies that calculating the overall recognition rate for all stages of the asylum procedure is not possible due to a lack of disaggregated data linking the outcomes at first instance decisions and final decisions on appeal for each person concerned.<sup>99</sup>

Finally, the main reason as to why the figures cited by the Commission should be treated with caution relates to the persisting disparities in recognition rates across Member States. This also applies to TCNs of the same nationality, whose recognition rate can vary considerably from Member State to Member State. According to the EASO 2020 report on asylum in EU,<sup>100</sup> for instance, average recognition rates ranged from 10 % in Czech Republic to 88 % in Switzerland, with 97 % of Afghan nationals receiving some form of protection in Switzerland and only the 32 % of them in Belgium.

### Critical reflection on the second dimension of the identified problem (return)

The analysis offered by the Commission on the second dimension of the problem, relating to the lack of effectiveness of return policies, seems to replicate many of the same methodological issues shown by the analysis carried out on asylum policies.

The Commission has paid much attention to the effectiveness of return policies in recent years, adopting a number of soft law instruments<sup>101</sup> and proposing a recast of the Return Directive.<sup>102</sup> In the meantime, Frontex's role in return has also grown considerably. Following the repeated reform

<sup>97</sup> According to EASO, 'the total recognition rate is calculated considering refugee status, subsidiary protection and humanitarian protection as positive decisions' (see EASO Asylum Report 2020 Annual Report on the Situation of Asylum in the European Union, section 4.5.2).

<sup>98</sup> See SWD(2020) 207, p. 29-30.

<sup>99</sup> Eurostat, Asylum Statistics 2019.

<sup>100</sup> See EASO Asylum Report 2020 Annual Report on the Situation of Asylum in the European Union, section 4.5.2.

<sup>101</sup> Peter Slominski & Florian Trauner (2021) 'Reforming me softly – how soft law has changed EU return policy since the migration crisis,' *West European Politics* 44(1): 93–113. See in particular the EU action plan on return (COM(2015) 453 final) and return handbook (C(2015) 6250) and their revised version of 2017 (respectively COM(2017) 200 final and C(2017) 6505). In 2017 the EC has also published a recommendation on 'making returns more effective' Com(2017) 1600 final).

<sup>102</sup> COM(2018) 634 final.

of its legal mandate (in 2016 and 2019), the Agency is expected to become a key actor of the EU return policy. This is already reflected in the surge in the number of return flights financed or coordinated by Frontex.<sup>103</sup>

More than 1.4 million TCNs have been returned over the last ten years.<sup>104</sup> While this is a significant number, the percentage of returns actually enforced out of the total of return decisions taken remains rather low (33%) and has even decreased in recent years. In fact, despite all of the Commission's efforts in redesigning the EU return policy, the return rate decreased from 45% in 2016 to 32% in 2018, finally falling to 29% in 2019.<sup>105</sup>

While existing evidence suggests that an effective and sustainable return policy largely depends on the capacity to incentivise the cooperation of both the returnees and third countries of return<sup>106</sup>, the SWD analysis focuses on a very specific harmonization problem. It suggests that the main reason for the ineffectiveness of the return policy lies in the existing weak link between the asylum and the return process. Again, the analysis of drivers offered presents several methodological issues.

The Commission's first argument is factual and connected with the argument of the changing nature of the migration flow to the EU discussed previously. The Commission contends that the increasing number of asylum seekers who fail to show a clear protection need upon arrival in the EU adversely impacts the return system by significantly increasing the return caseload.<sup>107</sup> According to Commission estimations, the share of rejected asylum seekers peaked at 80% of the total number of return decisions issued for that same year in 2019.

This percentage is, however, calculated using only first instance asylum rejection decisions. This means that the number of asylum seekers who are no longer entitled to stay in the EU is highly overestimated. If final asylum decisions are taken into consideration, the rate of rejected asylum seekers on the number of TCNs ordered to leave decreases to 40% (see Table 2.0-2).

Table 2.0-2 – Rejected asylum final decisions compared to TCNs ordered to leave (2015-2019)

	2015	2016	2017	2018	2019
Asylum final decisions - rejected	145.905	183.430	185.650	190.810	205.300
TCNs ordered to leave	528.645	486.150	505.300	478.155	513.470
%	28%	38%	37%	40%	40%

Source: Eurostat -European Union – 28 countries.

The second argument presented by the Commission is problematic on the grounds that it presupposes the policy solution offered. The Commission suggests that the main problem lies in the

<sup>103</sup> Jones, Chris, Jane Kilpatrick, and Mariana Gkliati, *Deportation Union. Rights, accountability, and the EU's push to increased forced removals*, London: Statewatch, 2020.

<sup>104</sup> Author's elaboration on Eurostat data.

<sup>105</sup> Author's elaboration on Eurostat data.

<sup>106</sup> EPRS, *The proposed Return Directive (recast) – Substitute Impact Assessment*, 2019, p. 9 and 115; ECRE, *Return Policy: Desperately Seeking evidence and balance. ECRE's assessment of latest developments in EU policy and law on returns*, 2019; Ruben, Ruerd, Marieke van Houte, and Tine Davids, *What Determines the Embeddedness of Forced-Return Migrants? Rethinking the Role of Pre- and Post-Return Assistance*, *International Migration Review*; International Detention Coalition, *There are Alternatives*, 2015.

<sup>107</sup> [SWD\(2020\) 207](#), p. 43.

so-called 'procedural loopholes' caused by the weak link between asylum and return procedures. In particular, according to the Commission, there are 'clear indications' that the practice of issuing asylum and return decisions in separate acts negatively affects the capacity of Member States to perform returns, favouring absconding.<sup>108</sup>

However, this argumentation fails to demonstrate a causal link. Rather than specifically discussing the experience of the Member States that already issue asylum and return decisions in the same act and presenting evidence that this has a direct positive impact on the return rate, the data presented by the Commission underline a mere correlation between a low return rate in some (not all) Member States and the practice of issuing a separate decision.<sup>109</sup> Most importantly, this is done without critically revising the potential incidence of other factors, such as the return caseload or the capacity of each Member State to obtain active cooperation from third countries.

The approach followed by the Commission largely mirrors the approach that was used in proposing the recast of the return directive, where 'key challenges to ensure effective returns' were seen in the need 'to reduce the length of return procedures, secure a better link between asylum and return procedures, and ensure a more effective use of measures to prevent absconding'.<sup>110</sup> This approach to an 'effective return policy' has already been criticised on different grounds. In particular, it has been suggested that the effectiveness of the return policy should not be measured purely in terms of the number of returns enforced.<sup>111</sup> While the 'return rate' can hardly be considered a reliable indicator of the effectiveness of return policies,<sup>112</sup> the exclusive emphasis on the rate of enforced returns is likely to incentivise a policy of return at any cost. This, in turn, will increase recourse to coercive means such as forced repatriation and detention, which, according to existing evidence, produces harm on individuals without having any significant impact on the effectiveness of the return policy.<sup>113</sup>

### 2.1.1 The absence of a broad and flexible mechanism for solidarity

The **second problem** identified by Commission relates to the **absence of a broad and flexible solidarity mechanism** in the current Dublin system.<sup>114</sup> Country desk research and interviews with national stakeholders reflect this issue to varying extents. Focusing on Italy, assessments of the working mechanisms of the Dublin system suggest that the system has put a disproportional strain

<sup>108</sup> [SWD\(2020\) 207](#), p. 43.

<sup>109</sup> [SWD\(2020\) 207](#), p. 44.

<sup>110</sup> Proposed Return Directive, Explanatory Memorandum, p. 2.

<sup>111</sup> ECRE, 'Return: no safety in numbers. ECRE's Analysis on recent developments in EU policy on return of migrants', 2017; Amnesty International, 'Position paper: The European Commission Proposal Recasting the Return Directive', 2018; Meijers Committee, '[CM1816 Comments on the proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals \(recast\), COM\(2018\) 634 final](#)', 2018; EPRS, 'The proposed Return Directive (recast) – Substitute Impact Assessment', 2019, p. 40. See also the European Parliament resolution of 17 December 2020 on the implementation of the Return Directive (2019/2208(INI)).

<sup>112</sup> This, in particular, as a consequence of the poor quality of the data on return collected and published by Member States, which in many cases are very likely to lead to a significant overestimation of the number of return decision issued (EPRS STU(2020)642840, Section 2.2).

<sup>113</sup> EPRS, The proposed Return Directive (recast) – Substitute Impact Assessment, 2019, p. 9 and 115; ECRE, Return Policy: Desperately Seeking evidence and balance. ECRE's assessment of latest developments in EU policy and law on returns, 2019; Ruben, Ruerd, Marieke van Houte, and Tine Davids, What Determines the Embeddedness of Forced-Return Migrants? Rethinking the Role of Pre- and Post-Return Assistance, International Migration Review; International Detention Coalition, There are Alternatives, 2015.

<sup>114</sup> European Commission, Explanatory Memorandum COM(2020) 610, p.11.

on the country when compared to other Member States.<sup>115</sup> When interviewed, representatives from the governments of Sweden noted that a lack of solidarity among Member States in absorbing refugees within their designated quotas is a pressing issue under the current system.<sup>116</sup> Similarly, representatives from the Greek authorities noted that due to the 'lack of a solidarity mechanism, Greece, and a few other states, found themselves receiving a very disproportionate amount of pressure on their reception and asylum systems.'<sup>117</sup>

To compensate for the imbalances in the distribution of reception responsibilities among Member States created by the current system, a number of initiatives have been implemented since 2015. However, the Commission assesses that the existing initiatives do not offer a structural solution to the problem.

### Critical reflection on the identified problem

Until 2015, solidarity has mainly been expressed through the provision of financial and technical support via various EU funding mechanisms and the role played by EU agencies on the ground. The Council Decisions of 2015 were the first specific measures adopted for the benefit of the overloaded asylum system of frontline Member States after years of discussion about fair responsibility sharing.<sup>118</sup>

There is, however, limited evidence to support the Commission's contention that implementation of the decisions was overall successful.<sup>119</sup> For example, the Council Decisions of 2015 envisaged the relocation of 160,000 asylum seekers by 2017. However, in the period from 2015 – 2017, only 21,999 asylum seekers were relocated from Greece and a further 12,713 from Italy. During the same period, 109,760 first instance asylum applications were lodged in Greece and 251,810 in Italy. This means that only 12% of asylum seekers were successfully relocated from Greece and 9% from Italy during the two-year implementation period foreseen by the Council Decisions.<sup>120</sup>

Similarly, in 2019, the most recent voluntary exercises of solidarity<sup>121</sup> led to the relocation of 2,000 TCNs that disembarked in Malta and Italy following SAR operations. This accounts for 29% of the 7,000 disembarked migrants during the same year following SAR operations in the so-called Central Mediterranean route, but just 14% of the overall number of arrivals recorded in 2019 on that route. In addition to the overall low number of successful relocations, the Commission underlines that the

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<sup>115</sup> Giacomo Orsini and Christof Roos: Institute for European Studies, [EU hotspots, relocation and absconded migrants in Italy. How to save Schengen within a failing Dublin system?, 2017](#) in Migration Pact Impact Assessment Country Research Italy, Ecorys, 2021, p. 7. F.

<sup>116</sup> Migration Pact Impact Assessment Country research for Sweden on the basis of desk research and interviews with the Swedish Ministry of Justice, the Swedish Migration Agency and the Swedish Refugee Law Centre, Ecorys, 2021.

<sup>117</sup> Migration Pact Impact Assessment Country research for Greece on the basis of desk research and interviews with IOM Greece and the Greek Ministry of Migration and Asylum, Ecorys, 2021.

<sup>118</sup> Steve Peers, EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law, Oxford Scholarship Online, August 2016, p. 305; Kay Hailbronner, Daniel Thym, EU Immigration and Asylum Law. A Commentary, Hart Publishing, 2016, 1589.

<sup>119</sup> [SWD\(2020\) 207](#), p.51.

<sup>120</sup> Elaboration on Eurostat data. For an evaluation on the implementation of the Council Decisions, see Guild, C. Costello, V. Moreno-Lax, Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, Study Requested by the LIBE Committee of the European Parliament, 2017; European Court of Auditors, Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results, Special Report, 2019.

<sup>121</sup> See in particular the [joint declaration of intent](#) signed at the informal summit between the interior ministers of Italy, Malta, France and Germany in La Valletta on 23 September 2019. On the so-called Malta declaration see also: Carrera S., Cortinovis R., The Malta declaration on SAR and relocation. A predictable EU solidarity mechanism?, CEPS, 2019.

ship-by-ship approach that is currently used, coupled with the complex negotiations that usually precede any such relocations, are likely to put migrants in already vulnerable conditions at further risk.<sup>122</sup> The concerns expressed by the Commission here are widely shared among the interviewed stakeholders.<sup>123</sup>

Notably, the Commission suggests that the main limitation of the more recent exercises of solidarity should be seen in the absence of 'legal provisions for the Member States to provide other forms of solidarity support',<sup>124</sup> and particularly in the fact that the 'discussions and actions on solidarity were almost exclusively focused on relocation.'<sup>125</sup> However, rather than offering an objective analysis of the problem, the Commission is already anticipating the policy solution by proposing return sponsorships.

While it may be technically correct to point to the reduced scope and procedural limitations of the Council Decisions of 2015, such a simplification runs the risk of leaving a key issue unaddressed: namely, the lack of a common understanding of the scope and content of the solidarity principle that undermined previous exercises of solidarity, which ultimately led to a stalemate in negotiations on the 2016 CEAS reform package.<sup>126</sup>

The real challenge is thus that of articulating a 'clear doctrine guiding the key determinations of 'how much solidarity' and 'what kind(s) of solidarity', and to define commensurate redistributive targets on this basis.'<sup>127</sup> Yet, a more pragmatic approach is chosen, rather than addressing the topic of solidarity and fair sharing of responsibility further.<sup>128</sup>

For instance, it has often been emphasised that the Commission is proposing an approach that takes 'many legitimate interests' and varying asylum demands into consideration and thus strikes 'a new balance between responsibility and solidarity'.<sup>129</sup> In this vein, it is suggested that while some Member State must cope with large-scale arrivals by land or sea or overpopulated reception centres, others face high numbers of unauthorised movements of migrants, putting a heavy burden on their asylum system.<sup>130</sup>

The Commission starts from the assumption that the burden created on frontline Member States by 'primary movements' is equivalent to the burden incurred by some of the other Member States as a result of 'secondary movements'. To substantiate this argument, the Commission seems to rely only on data pertaining to the absolute numbers of first-time asylum applications received by Member

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<sup>122</sup> [SWD\(2020\)207](#), p. 6 and p. 8.

<sup>123</sup> R. Cortinovis, S. Carrera, Search and rescue, disembarkation and relocation arrangements in the Mediterranean, 2019; Violeta Moreno-Lax, A New Common European Approach to Search and Rescue? Entrenching Proactive Containment, EU Migration Law Blog, 3 February 2021; ECRE, Relying on Relocation: ECRE Proposal for a Predictable and Fair Relocation following Disembarkation, 2019.

<sup>124</sup> [SWD\(2020\) 207](#), p. 51.

<sup>125</sup> *Ibid.*, p. 50.

<sup>126</sup> Francesco Maiani, A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact, EU Migration Law Blog, 20 October 2020.

<sup>127</sup> Maiani F., A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact, 2020.

<sup>128</sup> The expression is taken from the IPOL study on the New EU Pact (Carrera S. et al., The European Commission's legislative proposals in the New Pact on Migration and Asylum, Study for the LIBE Committee, Forthcoming). See also: Karageorgiou, The New Pact on Migration and Asylum: why Pragmatism Cannot Engender Solidarity, 2020; Thym D., European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum, 2020.

<sup>129</sup> Press statement by President von der Leyen on the New Pact on Migration and Asylum, 23 September 2020.

<sup>130</sup> COM(2020) 609, p. 1; COM(2020) 611, p.2.

States. However, a reference to absolute numbers alone is an incomplete way to assess the actual distribution of the burden of asylum among receiving Member States.<sup>131</sup>

Unfortunately, the SWD lacks any critical discussion on the data offered by multi-criteria indexes that have been developed to balance absolute numbers with the country's gross domestic product (GDP), population and territory.<sup>132</sup> The SWD is simply silent on the point, avoiding any reopening of the political dispute over the distribution key on which it proved to be impossible for Member States to agree on in the past.<sup>133</sup>

Moreover, the analysis of problems offered in the SWD seems to suggest that each asylum seeker/refugee has a negative economic impact on the host country (and thus, is to be considered a 'cost'). On the contrary, evidence offered by the existing scholarly literature is more nuanced. In particular, many have suggested that, especially in the stages following the first reception, asylum seekers and refugees are likely to have positive fiscal consequences on receiving countries, rapidly becoming economically active.<sup>134</sup>

In light of the existing evidence, it is fair to conclude that in evaluating the impact of primary and secondary movements on Member States, local circumstances (such as the demographic dimension of the host country and its economic strength) should be considered, but also the stage of the asylum process should play a crucial role. Asylum seekers and refugees are indeed more likely to be dependent on state aid at the very beginning of the process, becoming self-sufficient in later stages. This is a point that many of the experts interviewed in preparation for this study have often raised.<sup>135</sup>

### 2.2.2. Inefficiencies in the Dublin system

As a **third problem**, the Commission points to **the absence of a consistent and correct implementation of Dublin III rules and procedures** across the Member States<sup>136</sup> – a problem that has been flagged by interviewed stakeholders from five out of six countries selected for this study.<sup>137</sup>

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<sup>131</sup> Thielemann, E, Williams, R, Boswell, C (2010) What System of Burden-Sharing for the Reception of Asylum Seekers? European Parliament, Directorate General for Internal Policies; Wagner, M, Kraler, A., An effective asylum responsibility-sharing mechanism. ICMPD Asylum Programme for Member States – Thematic Paper, 2014.

<sup>132</sup> See: Angeloni, S., Improving the distribution of asylum-seekers through a multi-criteria index. European Union Politics, 20(2), 328–337, 2019.

<sup>133</sup> Migration Pact Impact Assessment interview with DG Migration and Home Affairs, Ecorys, 2021.

<sup>134</sup> See: Ruist 2020 The fiscal aspect of the refugee crisis; d'Albis H, Boubtane E, Coulibaly D. Macroeconomic evidence suggests that asylum seekers are not a 'burden' for Western European countries. Sci Adv. 2018 Jun 20;4(6).

<sup>135</sup> Migration Pact Impact Assessment Country Research for Greece on the basis of desk research and interviews with IOM Greece and the Greek Ministry of Migration and Asylum, Ecorys, 2021; Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021.

<sup>136</sup> [SWD\(2020\) 207](#), p. 54.

<sup>137</sup> See Migration Pact Impact Assessment Country Research for Sweden on the basis of desk research and interviews with the Swedish Ministry of Justice, the Swedish Migration Agency and the Swedish Refugee Law Centre, Ecorys, 2021 p. 3-4.; Migration Pact Impact Assessment Country Research for Greece on the basis of desk research and interviews with IOM Greece and the Greek Ministry of Migration and Asylum, Ecorys, 2021,, p. 6.; Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021,, p 7; Migration Pact Impact Assessment Country Research for Spain on the basis of desk research and an interview with the Comisión Española de Ayuda al Refugiado (CEAR), Ecorys, 2021,, p. 10.; Migration Pact Impact Assessment Country Research for Germany on the basis of desk research and interviews with the German Federal Ministry of the Interior, the German Red Cross and the Jesuiten Flüchtlingsdienst Deutschland, Ecorys, 2021 p, p. 5-6.

The Commission contends that the core objectives of the Dublin system remain valid and relevant.<sup>138</sup> However, it is considered that the current system does not sufficiently meet the objectives of ensuring swift access to the asylum procedure and discouraging multiple applications. The procedural inefficiencies of the current Dublin system are said to create an excessive administrative burden on Member States and to incentivise unauthorised movements.<sup>139</sup>

The Commission points to both the increasing number of first-time applications in a context of decreasing numbers of irregular arrivals, as well as the rising share of multiple applications recorded by Member States as evidence that the Dublin III regulation has had limited to no impact on achieving the objective of making asylum seekers stay in the Member State responsible for determining their application.<sup>140</sup>

The main problem is seen in the rules concerning the transfer of responsibility for examining an application for international protection between Member States, particularly when this shift occurs as a result of the behaviour of the applicant. These 'loopholes' in the system create a significant administrative burden on Member States, which have to start complex, and often ineffective take-back and take-charge procedures for the transfer of asylum applicants. They are also likely to delay access to the asylum procedure, as it may take up to 10 months before the actual examination of the claim starts.<sup>141</sup> In turn, this also stands to have significant consequences for the individuals affected, with applicants finding themselves in possible scenarios where detention is used.

### Critical reflection on the identified problem

There is extensive literature on the practical functioning of the Dublin system.<sup>142</sup> The system is commonly criticised for placing a disproportionate share of the responsibility on frontline Member States via the 'first country of irregular entry' criterion, which in fact largely prevails over the others.<sup>143</sup> The criterion is often justified with the need to encourage effective border controls<sup>144</sup>, yet evidence from the past twenty years of implementation of this criterion suggests that it has rather created a perverse incentive for lax border controls or, even worse, disregard of SAR obligations and illegal practices such as pushbacks.<sup>145</sup>

Furthermore, most of the literature evaluating the implementation of Dublin III agrees that the very purpose of the Regulation (i.e. to provide swift and fair access to asylum procedures in a single MS), is effectively undermined by the lengthy duration of the procedures, inadequate implementation of transfer decisions and insufficient compliance with human rights.<sup>146</sup>

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<sup>138</sup> [SWD\(2020\) 207](#), p. 54.

<sup>139</sup> COM(2020) 610, p. 14.

<sup>140</sup> [SWD\(2020\) 207](#), p. 57-63.

<sup>141</sup> [SWD\(2020\) 207](#), p. 62.

<sup>142</sup> ECRE (2008). *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, March 2008; Fratzke, S (2015). *Not Adding Up – The Fading Promise of Europe's Dublin System*, MPI Europe; Den Heijer, M, Rijpma, J, Spijkerboer, T., *Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System*, *Common Market Law Review*, vol. 53, p. 607-642, 2016.

<sup>143</sup> Other criteria for attributing responsibility set by the Dublin III regulation are related with family ties and the Members States' legal responsibility for the TCN entry in the EU (issuance of a visa or a residence permit). For an overview, see Peers, *EU Justice and Home Affairs Law*, Vol. 1. p. 298-299, 2016.

<sup>144</sup> See for instance: COM(2001)447: para 3.1.

<sup>145</sup> Thym, Hailbronner, *EU Immigration and Asylum Law. A Commentary*, 2016, 1493.

<sup>146</sup> EPRS, *Dublin Regulation on international protection applications, 2020*; Maiani, *The Reform of the Dublin III Regulation*, 2016.

The Commission uses as a basis for its discussion on the Dublin system the results of the study it has commissioned to the research consultancy ICF.<sup>147</sup> The results of the study commissioned by the European Parliament to ECRE are also mentioned in the SWD.<sup>148</sup> However, these studies strongly emphasise that the problems mainly lie in the overall design of the system, while the Commission leans towards a reading where the emphasis is placed on implementation problems. The focus is, in particular, on the procedural 'loopholes' incentivising unauthorised secondary movements, the consequence of which is a significant administrative burden on Member States and on their asylum systems.

Almost all of the studies conducted on the functioning of Dublin III agree that the regulation has failed to achieve one of its main objectives, namely that of limiting onward movements and multiple applications in different Member States. However, it is often underlined that an exact estimate of the phenomenon of secondary movements is difficult.<sup>149</sup> The Commission itself recognises that data provided by Member States concerning secondary movements cannot be exactly quantified.<sup>150</sup> Yet, its approach moves from the assumption that the evidence at hand suggests secondary movements are a major issue disrupting mutual trust in the CEAS.

Another identified issue concerning the reasoning on secondary movements lies in the fact that these are largely attributed to an ineffective functioning of the Dublin system, which facilitates asylum seekers' abusive behaviour and 'asylum shopping'.<sup>151</sup> Arguably, this appears to conflate a critical discussion on the main problem drivers and the presentation of policy solutions. This is particularly problematic here as what is left in the background is the questionable assumption that secondary movements should be attributed to the abusive behaviour of asylum seekers.

Maiani (2016) contends that terms such as 'asylum shopping' 'mislead policy-makers by confusing existential needs with frivolous personal convenience'.<sup>152</sup> In contrast, evidence suggests that secondary movements are largely attributable to the differences across Member States in how asylum claims are handled and how applicants are supported throughout the procedure.<sup>153</sup> Both the ECtHR and the CJEU have concluded that asylum seekers may have reasons to move from one EU country to another, rebutting the presumption that each Member State is to be considered as a safe country of asylum on which the entire Dublin system was built.<sup>154</sup>

The lack of CEAS harmonisation on asylum reception and decision-making was highlighted during expert interviews as the main reason behind secondary movements.<sup>155</sup>

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<sup>147</sup> European Commission, Evaluation of the Implementation of the Dublin III Regulation, 2016.

<sup>148</sup> EPRS, Dublin Regulation on international protection applications. European Implementation Assessment, 2020.

<sup>149</sup> ECRE, Dublin implementation assessment, 2020, p. 66. See also: Wagner, M., Perumadan, J. and Baumgartner, P., Secondary Movements. Ceaseval Research on the Common European Asylum System, Nr. 34, 2019; Takle, M., Seeberg, M. L., All European countries are not the same! The Dublin Regulation and onward migration in Europe. NOVA Report 12/15, 2015.

<sup>150</sup> [SWD\(2020\) 207](#), p. 33.

<sup>151</sup> Gursimran, B. [Adieu, Dublin ! But what's next?](#) European Law Blog, 23 November 2021.

<sup>152</sup> Maiani, The Reform of the Dublin III Regulation, 2016, p. 21.

<sup>153</sup> See EPRS European Implementation Assessment on the Dublin Regulation on international protection applications, European Parliament (February 2020); EPRS, The Cost of Non-Europe Report in Asylum Policy, 2018.

<sup>154</sup> ECtHR, M.S.S. v Belgium and Greece, no. 30696/09, 21 January 2011; and CJEU, Joined Cases N.S. (C-411/10) v Secretary of State for the Home Department and M.E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, (GC) 21 December 2011.

<sup>155</sup> Migration Pact Impact Assessment Country Research for Sweden on the basis of desk research and interviews with the Swedish Ministry of Justice, the Swedish Migration Agency and the Swedish Refugee Law Centre, Ecorys, 2021 Country Research; Migration Pact Impact Assessment Country Research for Italy on the basis of desk research

In addition to divergences in the implementation of the CEAS, there are often rational and understandable reasons why people choose to move to another Member State. These include, *inter alia*, language, family, community and historical links.<sup>156</sup> On the contrary, the Commission seems to part from the assumption that 'an applicant neither has the right to choose the Member States of application nor the Member States responsible for examining the application'.<sup>157</sup>

This is a clear departure from the recommendations of the Executive Committee of UNHCR, suggesting that 'the intentions of the asylum-seeker as regards the country in which he wishes to request asylum' shall be taken into account in every supranational cooperative arrangement on asylum.<sup>158</sup> In addition, this approach is also highly disputable as to its effectiveness. There is indeed evidence indicating that not taking into account asylum seekers' preferences is likely to hinder any attempt at establishing an efficient and sustainable CEAS. Secondary movements will likely continue, and the chances of asylum seekers' successful integration in the Member States responsible will be greatly reduced.<sup>159</sup>

### 2.2.3. The lack of targeted mechanisms to address crisis situations

The **fourth problem** identified by the Commission is the **lack of a mechanism to address situations in which an MS's asylum or reception system may become non-functional** due to a mass influx of irregular migrants or other situations of force majeure.

The Commission draws here on the experience of the COVID-19 pandemic and its impact on EU asylum and migration policies. The SWD suggests that while the EU is now better prepared than in the past, it needs to improve its crisis management system in order to ensure access to asylum at the border and improve the overall functioning of the CEAS, also in exceptional situations.<sup>160</sup>

In particular, there is the need to move from a reactive mode to one based on preparedness and anticipation.<sup>161</sup> Such an approach would entail, *inter alia*, establishing a procedure whereby existing rules can be adapted to address crisis and *force majeure* situations. According to the SWD, this will help to make the 'current migration management system more resilient and responsive in case of sudden events',<sup>162</sup> allowing Member States to take immediate measures to address extreme situations when they occur.<sup>163</sup>

Another problem identified by the Commission is the absence of clear definitions in the current Directive on Temporary Protection regarding the different types of mass influxes and relevant indicators for measuring. According to the Commission, this gap in the legislation, together with the

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and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021. Country Research

<sup>156</sup> See: Poppy James and Dr. Lucy Mayblin, Factors influencing asylum destination choice: A review of the evidence; Neumayer, E (2005). Asylum Destination Choice – What Makes Some West European Countries More Attractive Than Others?, 5 European Union Politics, p. 155-180.

<sup>157</sup> COM(2020) 610, p. 23.

<sup>158</sup> UNHCR Executive Committee (1979) Refugees Without an Asylum Country. No. 15 (XXX) 1979. Contained in United Nations General Assembly Document No. 12A (A/34/12/Add.1). See also UNHCR (2001). Revisiting the Dublin Convention, January 2001, Geneva.

<sup>159</sup> EPRS, The Cost of Non-Europe Report in asylum policy, 2018.

<sup>160</sup> European Commission, [SWD\(2020\)207](#), p. 63; see also COM(2020) 613, p. 1.

<sup>161</sup> COM(2020)613, p. 9.

<sup>162</sup> [SWD\(2020\) 207](#), p. 7.

<sup>163</sup> [SWD\(2020\) 207](#), p. 64.

procedural weaknesses of the mechanism, prevented Member States from attaining any agreement on its possible activation.<sup>164</sup>

### Critical reflection on the identified problem

The Commission's proposal is not supported by an independent or evidence-based evaluation of the effectiveness of existing tools, nor does it provide any substantive evidence to justify the establishment of a new instrument that would deal specifically with situations of crisis and force majeure. The SWD refers only to a 2016 study conducted by ICF international on the implementation of the Temporary Protection Directive.<sup>165</sup>

This is notable in light of the fact that the current legal framework already includes provisions that allow for adaptation in emergency situations, including provisions that allow for extended time limits in case of situations of emergency.<sup>166</sup> Besides this, different crisis preparedness mechanisms are already established by key EU regulations on asylum and border controls. For instance, the Dublin III Regulation provides for a mechanism to address 'particular pressure' on a Member State's asylum system, which could jeopardise the proper implementation of the Regulation.<sup>167</sup> Likewise, Regulation (EU) 2019/1896 on the European Border and Coast Guard Agency (EBCG/Frontex) provides for a mechanism whereby the operational and technical support offered by the EBCG in case a Member State is subject to 'disproportionate migratory pressure' could be further reinforced.<sup>168</sup> All of these mechanisms include complex risk assessment and monitoring procedures aimed at verifying the capacity and readiness of Member States to address present and upcoming challenges to their border control and asylum systems.

The proposal refers in broad terms to both the experience and lessons learned from the 2015 refugee 'crisis' and the recent COVID-19 pandemic in order to justify the adoption of 'specific rules that can address the exceptional situation of crisis in an effective manner'. However, as already suggested, the document does not elaborate any further on the underlying evidence and rationale that would justify the need to complement the existing tools with a new crisis management mechanism. Rather, the approach followed seems to reflect what has been defined as the 'crisification of EU policy-making',<sup>169</sup> whereby policy solutions are proposed without a thorough analysis of the underlying problem(s) to be addressed and existing policy tools.

#### 2.2.4. The lack of a fair and effective system for migrants and asylum seekers to access their rights

The Commission identifies as the **fifth problem** the **lack of a fair and effective system for migrants and asylum seekers** to access their rights. In particular, four more specific sub-problems are identified:

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<sup>164</sup> Ibid.

<sup>165</sup> European Commission (2016) Study on the Temporary Protection Directive.

<sup>166</sup> See for instance Article 18 of the Return Directive 2008/115/EC, and Article 31(3), Asylum Procedure Directive 2013/32/EU.

<sup>167</sup> Regulation (EU) No. 604/2013 on criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, Article 33.

<sup>168</sup> A similar mechanism is also provided for in the proposal for establishing a European Union Agency for Asylum, see Article 32 Regulation (EU) 2019/1896 and article 13 proposal EUAA.

<sup>169</sup> Rhinard, M. (2019) The Crisification of Policy-making in the European Union. *Journal of Common Market Studies*, 57: 616– 633.

- (1) The lack of a fair and effective system for asylum seekers to rapidly access the asylum procedure and to receive equal treatment in all Member States;
- (2) The lack of adequate protection of the principle of non-refoulement and of a system for preventing the use of illegitimate force against TCNs crossing the border both by land and by sea;
- (3) The lack of a system to offer adequate protection to migrants rescued in Search and Rescue operations;
- (4) The inadequate protection of the right to family reunification and of the rights of unaccompanied minors in the asylum process.<sup>170</sup>

### Critical reflection on the identified problems

While it is commendable that the Commission describes the lack of migrants and asylum seekers' access to rights as one of the main problems behind the adoption of the new pact, it is surprising to see that the main driver is identified as the administrative burden caused by the increasing proportion of applicants for international protection who are unlikely to receive protection.<sup>171</sup>

In consideration of the fact that when it comes to the obstacles faced by migrants and asylum seekers in accessing rights, evidence largely points to the lack of regular pathways for those seeking international protection to reach the EU and lodge an asylum application.<sup>172</sup>

Similarly, while the Commission acknowledges allegations of the use of force and violence against migrants attempting to cross EU external borders by sea or by land,<sup>173</sup> the proposal does not consider the possibility that these violations of fundamental rights may be a structural feature of current border control policies.

In consideration of the number and convergence of the reports denouncing excessive use of force and systematic breaches of migrants and asylum seekers' rights at EU borders,<sup>174</sup> and of the ongoing debate on how to improve the accountability of national and EU border agencies,<sup>175</sup> it is questionable that the SWD just points to the need for 'better translate and mainstream fundamental rights to all activities carried out by European Border and Coast Guard at EU and national level'.<sup>176</sup>

The evidence of socio-criminological research on police misconduct suggests that the prevailing factors in favouring episodes of excessive use of force or violation of fundamental rights do not have

<sup>170</sup> SWD(2020) 207, p. 64-65.

<sup>171</sup> SWD(2020) 207, p. 64.

<sup>172</sup> EPRS 2018. Humanitarian visas; EPRS, 'The Cost of Non-Europe Report in Asylum Policy', 2018. Gammeltoft-Hansen, T. (2011). *Access to asylum: International refugee law and the globalisation of migration control*. Cambridge University Press; Moreno-Lax, Violeta, *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law*. Oxford: Oxford University Press, 2017.

<sup>173</sup> SWD(2020) 207, p. 8 and 65.

<sup>174</sup> FRA, *Report on Migration: Fundamental rights issues at land borders*, 2020; FRA, *Migration: Key Fundamental Rights Concerns - Quarterly Bulletin 4*, 2020; IOM, *IOM Calls for End to Pushbacks and Violence Against Migrants at EU External Borders*, 2021; UNHCR, *UNHCR warns asylum under attack at Europe's borders, urges end to pushbacks and violence against refugees*, 2021.

<sup>175</sup> For an overview see: Costello, C., & Mann, I. (2020). *Border Justice: Migration and Accountability for Human Rights Violations*. *German Law Journal*, 21(3), 311-334; Karamanidou L, Kasperek B. *Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex*. (Global Migration: Consequences and Responses - RESPOND Working Paper Series); Meijers Committee (2011). *Frontex and pushbacks: obligations and accountability*. On Frontex lack of accountability, see European Court of Auditors (2021), *Special Report: Frontex's support to external border management: not sufficiently effective to date*.

<sup>176</sup> SWD(2020)207: 65.

to do with the psychological attitudes of individual officers or with the lack of training in fundamental rights protection. While improved fundamental rights accountability may help in reducing police misconduct, the decisive element is rather seen in the organisational factors of police work that favour the disregards of the rights of certain individuals represented as particularly threatening or dangerous.<sup>177</sup>

This is consistent with the opinion of those observers pointing to the fact that an excessive emphasis placed on border control and security has over time increased the risk of excessive use of force and human rights violations at the border.<sup>178</sup> In the words of the UN High Commissioner for Human Rights, 'policies aimed not at governing migration but rather at curtailing it at any cost, serve only to exacerbate risks posed to migrants, to create zones of lawlessness and impunity at borders, and, ultimately, to be ineffective'.<sup>179</sup>

The Commission emphasises the need to better mainstream fundamental rights in border control practices, whereas existing evidence suggests that the overall design of the EU integrated border control strategy is likely to favour disregard for the human rights of migrants and asylum seekers. This, in particular, on the account of the emphasis placed on the need to prevent TCNs from reaching EU borders by acting, in particular, in cooperation with third countries of origin and/or transit.<sup>180</sup>

## 2.3. Additional problems

Several additional problems were identified that were not included in the SWD.

### 2.3.1. Absence of safe and legal pathways for accessing asylum

For what concerns access to asylum, one of the main problems identified by the experts interviewed is the lack of legal pathways to the EU for the purpose of international protection.<sup>181</sup> This is

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<sup>177</sup> Invkovic (2014) 'Police Misconduct.' Reisig, Michael D, and Robert J Kane. 2014. *The Oxford Handbook of Police and Policing*: Oxford University Press; Gauthier, J., & Jobard, F. (2018). *Police. Questions sensibles*. Presses Universitaires de France; Jobard, Fabien. 2019. 'L'usage de la force par la police.' Pp. 390-401 in *Nouveau traité de sécurité. Sécurité intérieure et sécurité urbaine*, edited by Maurice Cusson; Etienne Blais; Olivier Ribaux; Michel Max Raynaud.

<sup>178</sup> Spijkerboer, Thomas. 2007. 'The Human Costs of Border Control.' *European Journal of Migration and Law* 9(1):127-39; Guild, E. (2009). *Security and Migration in the 21st Century*. Polity; Guild E. (2016) 'The Dark Side of Globalization: Do EU border controls contribute to death in the Mediterranean?' In Gammeltoft-Hansen, T., & Vedsted-Hansen, J. (eds.). *Human Rights and the Dark Side of Globalisation: Transnational law enforcement and migration control*. Taylor & Francis; Atak, Idil, and François Crépeau. 2014. 'Managing migrations at the external borders of the European Union: Meeting the human rights challenges.' *Journal Européen des Droits de l'Homme*.

<sup>179</sup> OHCHR. 2014. *Recommended Principles and Guidelines on Human Rights at International Borders*. New York (A/69/CRP. 1).

<sup>180</sup> On the human rights implications of the so-called external dimension of EU border control policies, see among others: Gammeltoft-Hansen, Thomas (2014) 'Extraterritorial migration control and the reach of human rights.' In *Research Handbook of International Law and Migration*. Edited by Vincent Chetail and Céline Bauhoz. Cheltenham: Edward Elgar Publishing. 113–131; Gammeltoft-Hansen, Thomas and James C. Hathaway (2014) 'Non-refoulement in a World of Cooperative Deterrence.' *Columbia Journal of Transnational Law*, 53(2): 235-284; Moreno-Lax, Violeta, and Mariagiulia Giuffré (2019) 'The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows.' In *Research Handbook on International Refugee Law*. Edited by Satvinder Singh Juss. Cheltenham: Edward Elgar Publishing. 82–108.

<sup>181</sup> Migration Pact Impact Assessment Country Research for Poland on the basis of desk research and interviews with the Polish Ministry of Interior, Department of International Affairs and the Polish Migration Forum, Ecorys, 2021; Country Research; Migration Pact Impact Assessment Country Research for Spain on the basis of desk research and an interview with the Comisión Española de Ayuda al Refugiado (CEAR), Ecorys, 2021.; Country Research; Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021;

consistent with the results of two studies carried out in 2018 by the European Parliament, which have highlighted that as a result of a lack of regular channels to reach the EU and of the limited scope of EU policies in the field of resettlement, most asylum seekers have to rely on smugglers and perilous journeys across the Mediterranean to be able to lodge an asylum application.<sup>182</sup>

While the Commission refers to the absence of EU legal competence on the issue,<sup>183</sup> many civil society experts suggest that the Commission is still too focused on how to limit rather than to strengthen legal channels for migration into EU.<sup>184</sup> According to TFEU 79 (5), the right of Member States to regulate the number of third-country citizens admitted to their territory in order to seek work, whether employed or self-employed, is unaffected by this Article. However, it should be noted that any Member State decision to admit or deny third nationals could and will ultimately affect other Member States as well since once acquired a legal resident in a Schengen Area, the third national can travel and deliver services in other Member States.<sup>185</sup> It is debatable whether such a decision would affect the duty of admitting asylum seekers who are seeking protection at borders or within territory since this obligation derives from the non-refoulement principle.<sup>186</sup>

In the same vein, the European Economic and Social Committee (EESC) regrets that the Pact devotes most of its proposals to the management of external borders and return while failing to pay due attention to regular channels for immigration, safe pathways for asylum or the inclusion and integration of non-EU nationals in the EU.<sup>187</sup>

### 2.3.2. Inadequate reception conditions in border areas

Overall, the uneven implementation of the CEAS among Member States is among the most pressing problems identified by many of the experts interviewed<sup>188</sup> and consistent with desk research.<sup>189</sup> Yet, interviewees have underlined the specific challenge of overcrowded camps and inadequate reception conditions in many EU border regions, such as the Aegean Islands (Greece), Canary Islands (Spain), Apulia (Italy), Sicily (Italy).<sup>190</sup> As thousands of asylum seekers are currently trapped on islands

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Country Research; Migration Pact Impact Assessment interview with Meijers Committee, Ecorys, 2021.; Migration Pact Impact Assessment interview with European Med Rights, Ecorys, 2021.]

<sup>182</sup> EPRS, Humanitarian visas, 2018; EPRS, [The Cost of Non-Europe Report in Asylum Policy](#), 2018.

<sup>183</sup> Migration Pact Impact Assessment interview with DG Migration and Home Affairs, Ecorys, 2021.

<sup>184</sup> Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021 Country Research); Migration Pact Impact Assessment interview with Migration Policy Centre, Ecorys, 2021; Migration Pact Impact Assessment interview with Meijers Committee, Ecorys, 2021.

<sup>185</sup> Vermeulen and Desmet, *Essential Texts on European and International Asylum and Migration Law and Policy*, 2019.

<sup>186</sup> Bayefski, A. *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers* (2006).

<sup>187</sup> European Economic and Social Committee, *Opinion on the Pact*, § 1.2.

<sup>188</sup> Migration Pact Impact Assessment Country Research for Germany on the basis of desk research and interviews with the German Federal Ministry of the Interior, the German Red Cross and the Jesuiten Flüchtlingsdienst Deutschland, Ecorys, 2021; Country Research; Migration Pact Impact Assessment Country Research for Sweden on the basis of desk research and interviews with the Swedish Ministry of Justice, the Swedish Migration Agency and the Swedish Refugee Law Centre, Ecorys, 2021; Country Research Migration Pact Impact Assessment Country Research for Poland on the basis of desk research and interviews with the Polish Ministry of Interior, Department of International Affairs and the Polish Migration Forum, Ecorys, 2021; Country Research; Migration Pact Impact Assessment interview with Meijers Committee, Ecorys, 2021; Migration Pact Impact Assessment interview with Red Cross EU Office, Ecorys, 2021.

<sup>189</sup> EPRS, 'The Cost of Non-Europe Report in Asylum Policy', 2018; EPRS, 'Asylum procedures at the border', EPRS, European Parliament, November 2020.

<sup>190</sup> Migration Pact Impact Assessment Country Research for Spain on the basis of desk research and an interview with the Comisión Española de Ayuda al Refugiado (CEAR), Ecorys, 2021 Country Research; Migration Pact Impact Assessment Country Research for Greece on the basis of desk research and interviews with IOM Greece and the Greek Ministry of

or other remote regions, the practice of keeping asylum seekers at the border, either by placing them in detention or limiting their freedom of movement, is depicted as posing particular challenges to asylum seekers' access to rights that should be addressed specifically.

### 2.3.3. Absence of recognition of asylum seekers' preferences

As already suggested in our critical analysis, the issue of asylum seekers' secondary movements is closely related to the proper implementation of the CEAS. Interestingly, experts of an international NGO and from the Italian government we interviewed in preparation for this study expressed their firm conviction that one of the main drivers behind the failure of EU asylum policies is that asylum seekers' preferences and wishes are not properly considered.<sup>191</sup>

The lack of consideration for asylum seekers' preferences is seen as one of the main drivers behind secondary movements and lack of integration in the Member State of first asylum, and one of the main reasons behind the need to make an increased recourse to coercive measures (such as forced transfers and detention in the framework of the Dublin system) for implementing the CEAS.<sup>192</sup>

### 2.3.4. Challenges of the post-arrival stage

One of the main findings of the 2018 EPRS report on the *Cost of non-Europe in asylum policy* was that there is a lack of consideration for the distinctive challenges of the post-arrival stage.<sup>193</sup>

In particular, migrants and refugees legally residing in the EU need to be able to start their life in their host societies as soon as possible, including through access to education, training and the labour market, and family reunification. However, in the case of asylum seekers, during the post-application phase, there are several administrative obstacles to accessing the labour market. Social services for socio-economic integration across Member States are limited, and mutual recognition of positive asylum decisions is lacking. In consequence of this, asylum seekers remain trapped in the country of reception, which does not necessarily offer them the best or fastest conditions for integrating into the EU society and, in turn, becoming net contributors.

## 2.4. Conclusion: What are the most pressing problems?

In conclusion of our critical review of the problems and related drivers as identified by the Commission and of the additional challenges we identified, we can try to identify those that according to the main stakeholders and the existing scholarly literature should be considered as the most pressing problems. We will also try to identify the main drivers behind these problems and their consequences. The main results of our critical analysis are outlined in Figure 2.4:1 below, showing a revised problem tree.

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Migration and Asylum, Ecorys, 2021 Country Research; Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021. Country Research.

<sup>191</sup> Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021 Country Research; Migration Pact Impact Assessment interview with Red Cross EU Office, Ecorys, 2021.

<sup>192</sup> Maiani, 'The Reform of the Dublin III Regulation', 2016; EPRS, 'The Cost of Non-Europe Report in Asylum Policy', 2018; EPRS 2020. Dublin Regulation on international protection applications.

<sup>193</sup> EPRS, 'The Cost of Non-Europe Report in Asylum Policy', 2018.

### 2.4.1. Lack of a fair and effective system for migrants and asylum seekers to access their rights

The first most visible issue is related to the lack of a fair and effective system for migrants and asylum seekers to access their rights. While this problem is also featured in the Commission's analysis, it was seen mainly as a kind of side effect of the lack of an integrated approach at EU level. As seen, this is the first problem the Commission identifies. A problem which, as a consequence of the alleged increased share of asylum seekers not showing clear protection needs, it is believed to cause an excessive strain of national asylum and return systems.

Main stakeholders<sup>194</sup> and the existing scholarly literature<sup>195</sup> suggest instead that the main drivers behind this problem are to be found in the absence of legal pathways to asylum, in the inadequate implementation of the CEAS – in particular for what concerns the existence of significant discrepancies across Member States in the quality of reception conditions, length of asylum procedures, recognition rates – and in the lack of a common framework for integrating protection seekers in the EU society.

### 2.4.2. Lack of a fair system for allocating responsibility between Member States

The second most visible issue is related to the perceived lack of a fair system for allocating responsibility between Member States. Interestingly, this issue was not only raised by experts from the southern Member States, which all agreed in pointing to the Dublin system and the absence of a structural solidarity mechanism for the excessive pressure placed on their reception and asylum systems.<sup>196</sup> Also, government representatives from northern Member States were ready to admit that the current system produces imbalances, which are aggravated by the lack of political will some Member States have shown in accepting their designated quota of asylum seekers.<sup>197</sup>

Two of the problems identified by the Commission are clearly related to responsibility sharing and solidarity. The main difference with respect to the approach followed by main stakeholders and the existing scholarly literature is on the side of drivers. While the Commission sees the main drivers in the procedural inefficiencies of the current Dublin system and in the absence of legal tools to offer solidarity beyond relocation, previous sections showed that main stakeholders and the scholarly literature offer a radically different diagnosis. In particular, these point to the main problems in the overall design of the Dublin system, in particular for what concerns the prevalence of the first country of irregular entry criterion, the lack of consideration for Asylum Seekers' preferences in the determination of the Member State responsible, and the lack of a common understanding of the scope and content of the principle of solidarity and fair sharing of responsibility.

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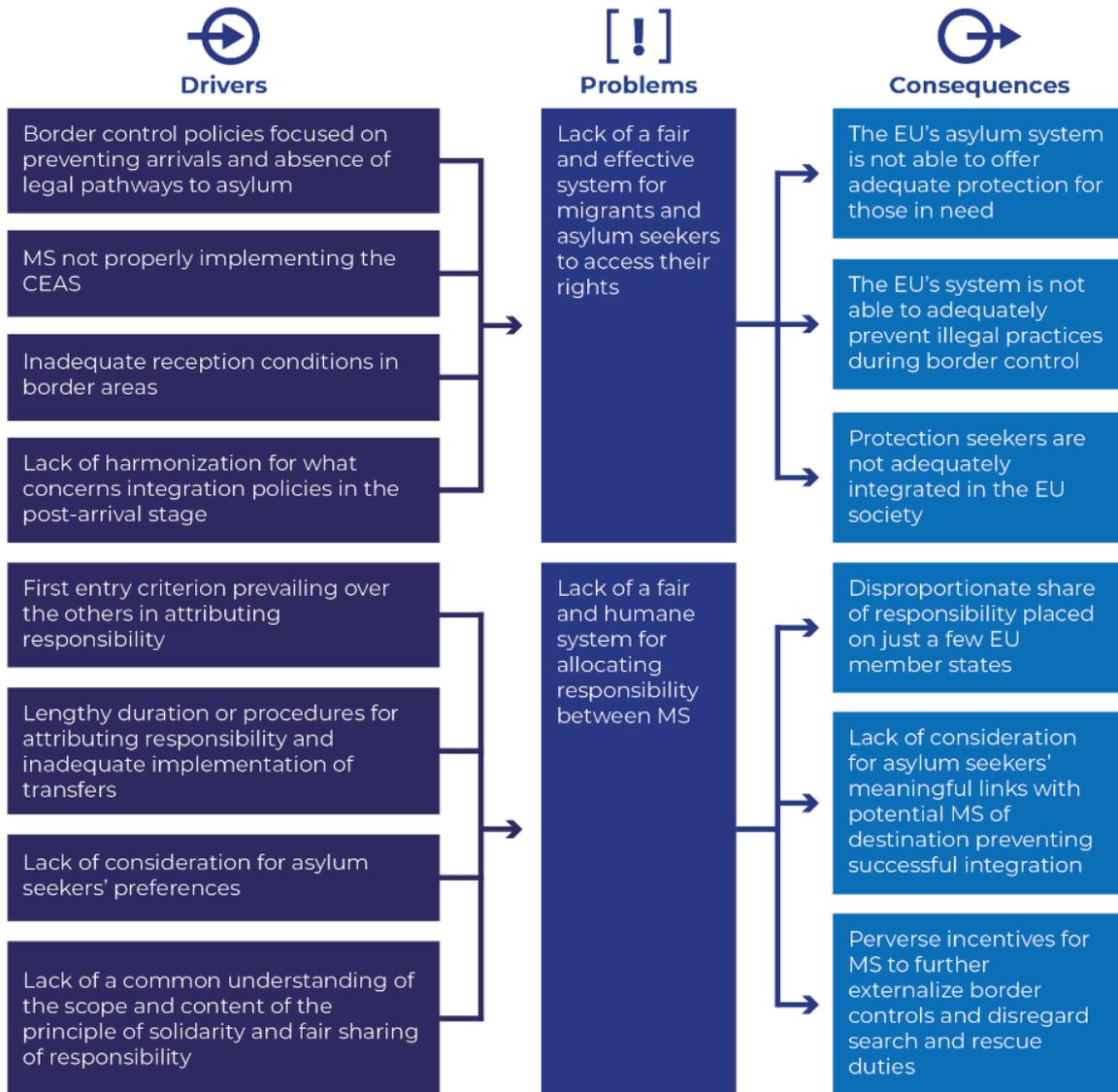
<sup>194</sup> Migration Pact Impact Assessment interview with Meijers Committee, Ecorys, 2021; Migration Pact Impact Assessment interview with Red Cross EU Office, Ecorys, 2021; Migration Pact Impact Assessment interview with IOM, Ecorys, 2021.

<sup>195</sup> EPRS, 'The Cost of Non-Europe Report in Asylum Policy', 2018.

<sup>196</sup> Migration Pact Impact Assessment Country Research for Greece on the basis of desk research and interviews with IOM Greece and the Greek Ministry of Migration and Asylum, Ecorys, 2021; Country Research; Migration Pact Impact Assessment Country Research for Spain on the basis of desk research and an interview with the Comisión Española de Ayuda al Refugiado (CEAR), Ecorys, 2021; Country Research; Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021; Country Research.

<sup>197</sup> Migration Pact Impact Assessment Country Research for Sweden on the basis of desk research and interviews with the Swedish Ministry of Justice, the Swedish Migration Agency and the Swedish Refugee Law Centre, Ecorys, 2021; Country Research; Migration Pact Impact Assessment Country Research for Germany on the basis of desk research and interviews with the German Federal Ministry of the Interior, the German Red Cross and the Jesuiten Flüchtlingsdienst Deutschland, Ecorys, 2021; Country Research).

Figure 2.4:1 – Revised problem tree based on the findings of critical review



Source: Ecorys, 2021.

## 3. Review of the objectives of the new pact on migration and asylum

### 3.1. Introduction

#### Key findings

- The objectives of the new pact are not defined precisely, nor does the new pact provide clear criteria against which the success of the proposed measures can be assessed. This is particularly so in relation to the objectives of efficiency, countering secondary movements and preventing abuse/misuse of procedures. There is no clear distinction between objectives and measures/solutions;
- The objective of a fairer and more effective system to reinforce migrants and asylum seekers' rights is clear and corresponds in general terms to the problems that migrants encounter in accessing their rights under EU law. Coupling this objective with the additional objective of accelerating procedures is problematic. There is little elaboration on how this objective relates to the specific problems that migrants encounter (e.g. ongoing violations of international law in the context of SARs and at the borders; non-compliance of Member States with the CEAS; ineffective asylum procedures);
- While the new pact's objectives of efficiency and effectiveness of procedures; solidarity; countering secondary movements; preventing abuse; combating illegal migration and cooperation on return; and effective protection of migrants' rights do correspond to the problems identified by the Commission, there is no clear correspondence between the objectives of the new pact and other problems. This includes, most notably, the implementation gap; the lack of sustainable return policies; and limited legal pathways for migration.

In this Chapter, we will review the objectives of the new pact as identified by the Commission in the SWD.<sup>198</sup> This stage, in combination with the problem identification described in Chapter 2 of this research, is critical for creating the logical connection between problems, objectives, and solutions as part of the impact assessment.<sup>199</sup>

In Section 3.2, we will begin by pointing out some **challenges in reviewing the objectives** of the new pact. We will subsequently examine the five objectives that the Commission identifies in the SWD, discussing whether they can be categorised as general and/or specific, and we will review whether they are clearly identified, including the criteria against which the success of the proposed measures can be assessed.<sup>200</sup> We will also analyse whether the objectives are relevant in relation to the problems identified by the Commission and how they relate to any additional problems. After answering these questions in relation to each objective identified by the Commission (Sections 3.3-

<sup>198</sup> This Chapter is about critically reviewing the objectives of the new pact, and establishing whether there are clear benchmarks to measure the success of the policy intervention. As problems, measures and objectives are regularly conflated in the SWD, it may be useful to point out that this chapter does not include a review of problems or measures. The study team has also looked at the individual proposals to clarify the new pact's objectives, but we note that this report cannot provide a full impact assessment of each proposal separately.

<sup>199</sup> European Commission, [SWD\(2017\) 350](#) 'Better Regulation Guidelines', p.20. This is the standard procedure for impact assessments and which, as noted above, should have been followed by the Commission to remain compliant with the IIA BLM.

<sup>200</sup> European Commission, Better Regulation Tool #16 How to set objectives.

3.7), we will examine whether further objectives could have been considered for inclusion in the new pact (Section 3.8.) and we will present our conclusive assessments (Section 3.9).

## 3.2. Preliminary remarks on the Commission's identification of objectives

The Commission presents the overall objective of the new pact as 'a fair, efficient and sustainable migration and asylum management system that respects fundamental rights under EU and international law, including at the EU external borders.'<sup>201</sup> When presenting particular objectives, it does not distinguish these as general, specific or operational,<sup>202</sup> nor does it explain how they relate to each other. Differences between measures and objectives are also not clearly defined.<sup>203</sup> For example, the wording used in the SWD makes it difficult to understand whether 'a more efficient, seamless and harmonised migration management system' is an objective in itself, or rather a measure to achieve the specific objectives of 'limiting unauthorised movements' and reducing 'asylum shopping.'<sup>204</sup> The term 'objectives' with specific reference to the instruments contained in the new pact – or to the new pact as a whole – is only used three times in the SWD.<sup>205</sup>

Section 5 of the SWD is dedicated to addressing problems<sup>206</sup> under five different headings: (1) A more efficient, seamless and harmonised migration management system; (2) A fairer and more comprehensive approach to solidarity; (3) Simplified and more efficient rules for robust migration management; (4) Targeted procedures and mechanisms to address extreme crisis situations and situations of *force majeure*; (5) A fairer and more effective system to reinforce migrants and asylum seekers' rights.

It is not always clear whether these headings correspond to objectives or measures.<sup>207</sup> As a result, reviewing the objectives of the new pact is not a straightforward exercise.<sup>208</sup> In the Sections below, we will follow the structure of Section 5 of the SWD as set out above ('Addressing the Challenges'), teasing out general, specific or operational objectives of the new pact. We will use as a starting point for our review the introduction to the Section on Addressing the Challenges in the SWD, where the Commission provides the following general, specific and/or operational objectives of the new pact:<sup>209</sup>

### 1. Fairness in procedures;

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<sup>201</sup> [SWD\(2020\) 207](#), p.1.

<sup>202</sup> Which would be required in a normal impact assessment, also facilitating further monitoring.

<sup>203</sup> [SWD\(2020\) 207](#), Chapter 5.

<sup>204</sup> [SWD\(2020\) 207](#), p. 70.

<sup>205</sup> Thus, on pp. 13 and 83, the Commission describes the objective of the Crisis and Force Majeure Regulation as providing 'for the necessary adaptation of the rules [in other instruments] in order to ensure that Member States are able to address situations of crisis and force majeure [...]'. On p. 96, in the Section dealing with Reporting Obligations, the Commission writes with regard to the Screening Regulation that 'the proposal is expected to positively impact the management of migration at external borders and thus it is expected to allow for achieving the objective of establishing a seamless migration management.'

<sup>206</sup> Note that the term 'challenges' is being used by the Commission. In the case of this study, the term 'problems' will be employed to reflect the Better Regulation terminology.

<sup>207</sup> [SWD\(2020\) 207, p. 15 onwards](#).

<sup>208</sup> As mentioned above, a full assessment of the objectives of each proposal separately, let alone of the objectives of the CEAS as a whole, goes beyond the scope of this impact assessment, in view of its limitations in terms of time, resources and page limit.

<sup>209</sup> [SWD\(2020\) 207](#), p. 70.

2. Efficiency and effectiveness of procedures;
3. Ensuring solidarity and responsibility (in situations of pressure and crisis);
4. Limiting unauthorised movements (includes asylum shopping);
5. Recognition of particular characteristics and needs arising from SAR disembarkations;
6. Further harmonisation of procedures.

These objectives are analysed more in detail in the following paragraphs.

**Fairness** as an objective is also found in the overall objective of the Pact ('**fair**, efficient and sustainable system'). Fairness is a general objective as it is a Treaty-based goal.<sup>210</sup> It aligns with the objective of the CEAS as a whole, i.e. establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection.<sup>211</sup> In the Stockholm Programme, the Council emphasised that the CEAS 'should be based on high protection standards' and that 'due regard should also be given to fair and effective procedures capable of preventing abuse.'<sup>212</sup> Fairness also denotes equality or equivalence of treatment of migrants in view of the rationale of the CEAS: 'similar cases should be treated alike and result in the same outcome.'<sup>213</sup> Therefore, for the purposes of this study, we understand fairness as entailing **respect for fundamental rights and equality in treatment**. Respect for fundamental rights includes but is not limited to prohibition of refoulement and the right to asylum as recognised by the Charter of Fundamental Rights of the EU. Apart from fairness to migrants, fairness in the new pact is also used to describe the desired relations between Member States, thus denoting solidarity and responsibility sharing.

**Procedural efficiency** is also a general objective of the new pact, as it corresponds to the Treaty-based goal of 'efficient management of migration flows' (Article 79(1) TFEU). In the new pact, such efficiency is mostly understood in relation to managing 'mixed flows'. The Commission does not define efficiency in the SWD, nor in the separate legislative proposals. We understand efficiency as entailing the question of whether the same result could have been achieved at a lower cost, and/or a lesser administrative burden, and/or faster. **Effectiveness** is not mentioned separately in the SWD, but it is alluded to in several places, mostly to refer to the effectiveness of returns. It aligns with the overall objective of the CEAS to establish 'fair and effective procedures capable of preventing abuse.'<sup>214</sup>

**Ensuring solidarity** is a general objective in that it corresponds to the Treaty-based goal of solidarity (Article 80 TFEU). It corresponds to the objectives of 'fairness and sustainability' of the system that the new pact aims to establish and accordingly also fits with the overall objective of the CEAS.

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<sup>210</sup> 'Offering appropriate status to any third-country national requiring international protection' (Article 78(1) TFEU); 'Ensuring compliance with the principle of non-refoulement [...] in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties' (Article 78(1) TFEU); 'Ensuring [...] the efficient management of migration flows' (Article 79(1) TFEU); 'Ensuring [...] fair treatment of third-country nationals residing legally in Member States' (Article 79(1) TFEU).

<sup>211</sup> DG Home, [website on the CEAS](#), 2020.

<sup>212</sup> Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2009, p. 69 and p. 71.

<sup>213</sup> Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2009, p. 32.

<sup>214</sup> Council of the European Union, 'The Stockholm Programme – An open and secure Europe serving and protecting the citizens' (2009) pp. 69 and 71.

**Limiting unauthorised movements, countering asylum shopping and recognition of particular characteristics and needs arising from SAR disembarkations** can be seen as specific objectives, as these set out specifically what the policy intervention is meant to achieve. They can be linked with the general objectives mentioned in Article 78 and 79 of the TFEU.<sup>215</sup>

**Further harmonisation of procedures** is difficult to qualify as a general or specific objective as it is a means to reach the Treaty-based goals in Articles 77, 78, 79 and 80 TFEU.<sup>216</sup> It can, however, be qualified as an operational objective seeing that it essentially amounts to the deliverable of specific policy actions (harmonisation as a result of law-making in this case). It aligns with the rationale of the CEAS, which is that 'similar cases should be treated alike and result in the same outcome.'<sup>217</sup>

Figure 3.2:1 – The identification of objectives



Source: Ecorys, 2021.

<sup>215</sup> Carrying out checks on persons and efficient monitoring of the crossing of external borders (Article 77 TFEU para 1 under b); Offering appropriate status to any third-country national requiring international protection (Article 78 para 1); Ensuring compliance with the principle of non-refoulement in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties (Article 78 para 1); Efficient management of migration flows (Article 79 para 1); Prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings (Article 79 para 1); Giving effect to the principle of solidarity (Article 80).

<sup>216</sup> These are the following: Carrying out checks on persons and efficient monitoring of the crossing of external borders (Article 77 TFEU para 1 under b); Gradual introduction of an integrated management system for external borders (Article 77 para 1 under c); Offering appropriate status to any third-country national requiring international protection (Article 78 para 1); Ensuring compliance with the principle of non-refoulement in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties (Article 78 para 1); Efficient management of migration flows (Article 79 para 1); Fair treatment of third-country nationals residing legally in Member States (Article 79 para 1); Prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings (Article 79 para 1); Giving effect to the principle of solidarity (Article 80).

<sup>217</sup> Council of the European Union, 'The Stockholm Programme – An open and secure Europe serving and protecting the citizens' (2009) p. 31.

### 3.3. A more efficient, seamless and harmonised migration management system

The objectives of procedural efficiency and harmonisation have already been discussed above. 'Seamlessness', however, does not appear to be an objective in itself but rather a measure to attain the operational objectives of **efficiency** and **'countering misuse'** of the asylum system.

#### 3.3.1. Efficiency

The efficiency of procedures relates both to asylum procedures and return procedures, and should be distinguished from effectiveness.<sup>218</sup> Efficiency can be seen as a general objective in that it contributes to the Treaty goal of 'efficient management of migration flows'.<sup>219</sup>

Efficiency has, however, not been further specified in the SWD by setting out concretely what the policy intervention is meant to achieve. Instead, references to various elements of efficiency are scattered throughout the document: efficiency is understood 'time-wise and resource-wise',<sup>220</sup> it is about preventing 'misuse of the asylum system' and reducing the overall costs;<sup>221</sup> it can refer to the time to transfer under Dublin and the rate of actual transfers;<sup>222</sup> it is impacted by the risk of absconding,<sup>223</sup> costs of detention,<sup>224</sup> and the administrative burden on Member States.<sup>225</sup> High social costs linked to irregular migration are mentioned but not elaborated upon.<sup>226</sup> Return efficiency is simply reduced to return rates.<sup>227</sup> As such, the criteria against which the success of the proposed measures will be assessed are unclear. As a result, it is also difficult to assess to what extent 'efficiency' as a policy objective responds to the problems identified by the Commission. The SWD thus lacks benchmarks to assess efficiency of the Pact as a whole.<sup>228</sup>

#### 3.3.2. Countering misuse of asylum procedures

**Countering misuse of the asylum system** has not been further defined in the SWD. Therefore, it remains unclear how this objective relates to the Treaty-based goals of 'preventing and combating illegal immigration'.<sup>229</sup> Instead of defining abuse or misuse in the SWD, the Commission refers to it as actions by 'people who only aim at preventing their removal from the Union'.<sup>230</sup>

<sup>218</sup> Effectiveness is mentioned as a separate objective only with regard to the screening procedure, European Commission, [SWD\(2020\) 207](#), p. 69.

<sup>219</sup> Article 79(1) [TFEU](#).

<sup>220</sup> [SWD\(2020\) 207](#), p. 50.

<sup>221</sup> [SWD\(2020\) 207](#), p. 54.

<sup>222</sup> [SWD\(2020\) 207](#), p. 57.

<sup>223</sup> Ibid.

<sup>224</sup> [SWD\(2020\) 207](#), p. 58.

<sup>225</sup> [SWD\(2020\) 207](#), p. 81.

<sup>226</sup> [SWD\(2020\) 207](#), p. 58.

<sup>227</sup> [SWD\(2020\) 207](#), p. 44. and p. 22 where the current return system is discussed in terms of effectiveness, not efficiency, another indication that the objectives of EU action are not clearly set.

<sup>228</sup> As mentioned above, a full assessment of the objectives and benchmarks to assess the success of EU action per proposal goes beyond the scope of this IA.

<sup>229</sup> Article 79(1) [TFEU](#).

<sup>230</sup> [SWD\(2020\) 207](#), p. 93. Countering abusive claims is also touched upon as an objective of the border procedure, which will 'facilitate [a] quick return.' [SWD\(2020\) 207](#), p. 49.

The difference between 'abuse' or 'misuse' of the asylum system on the one hand, and the mere filing of applications for international protection that are rejected by the Member States (either in the first instance or in appeal), is not explained in the SWD. This, coupled with the stark differences in recognition rates across Member States,<sup>231</sup> results in undefined criteria against which the success of the proposed measures can be assessed. For the same reasons, it is also difficult to assess to what extent **this objective is relevant in relation to the particular problems** identified by the Commission, especially in light of the fact that the 'abuse' of the asylum system was not identified as a separate problem.

### 3.3.3. Harmonisation in order to counter inefficiencies and secondary movements

In the SWD, harmonisation is not only presented as an objective in itself but serves to counter 'inefficiencies' and secondary movements 'of migrants across Europe to seek the best reception conditions and prospects for their stay'.<sup>232</sup> Efficiency has been discussed in the previous sections of this study. Countering secondary movements is a specific objective that makes the Treaty-based goal of combating and preventing illegal immigration more concrete.<sup>233</sup> This objective can also be seen as linked to the effective application of rules on the allocation of responsibility.

The Commission acknowledges that 'secondary movements cannot be exactly quantified, as there is for the moment not one single indicator for measuring this phenomenon'.<sup>234</sup> However, without a clear qualification or quantification of this phenomenon, it is difficult to measure the success of the policy intervention.

In addition, without paying detailed attention to the application and implementation of harmonised standards at the domestic level, the way in which the success of the policy intervention can be assessed remains vague.<sup>235</sup> Indeed, it is unclear how the objective of (further) harmonisation of procedures relates to the problem of the lack of uniform implementation and application of existing EU law at the domestic level, specifically with regard to reception conditions.

In conclusion, the objectives of the efficient, seamless and harmonised migration management system, namely efficiency, countering abuse and secondary movements, remain unclear, not well defined and at times in tension with each other. In this respect, it should be highlighted that efficiency as an objective has little added value if the substantive objectives of the relevant policies remain vague and inconsistent.<sup>236</sup>

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<sup>231</sup> In the SWD, the Commission acknowledges the differences in recognition rates by mentioning the replacement of the Qualification Directive with a Regulation, arguing that this will result in 'greater convergence of recognition rates and forms of protection.', [SWD\(2020\) 207](#), p. 66.

<sup>232</sup> [SWD\(2020\) 207](#), p. 21.

<sup>233</sup> Article 79(1) [TFEU](#).

<sup>234</sup> [SWD\(2020\) 207](#), p. 33. See also pp. 7 and 59, explaining that there is no clear picture of 'onward movement'. See also Migration Pact Impact Assessment interview with DG Migration and Home Affairs, Ecorys, 2021.

<sup>235</sup> It can be argued that these are operational objectives and as such only come into play when establishing the operational monitoring and evaluation framework for the implemented policy measure, see Chapter 8 of this report.

<sup>236</sup> Seeing that efficiency is about the process used to achieve goals. It could even be argued that in policy area as politically charged as immigration, efficiency in itself cannot be a policy goal. Nonetheless, the Treaty mentions efficiency as well.

### 3.4. A fairer and more comprehensive approach to solidarity

The objective of a fairer and more comprehensive approach to solidarity is about embedding 'fairness into the EU asylum system' and ensuring that the needs created by the irregular arrivals of migrants and asylum seekers are handled 'by the EU as a whole', especially in situations of crisis and migratory pressure.<sup>237</sup> This is a general objective, in that it corresponds to the Treaty-based goal of giving effect to solidarity amongst Member States (Article 80 TFEU). It is made specific by the Commission by setting out concretely what the proposed measures are meant to achieve: mandatory and flexible solidarity to respond 'predictably and effectively to changing realities with an increasing share of mixed migration flows towards the Union';<sup>238</sup> and a more predictable and structured system to deal with the situation of migrants disembarked following SAR operations.<sup>239</sup>

The criteria against which the success of the measures can be assessed are clear, as solidarity can be measured in numbers of relocations and economic and financial terms.<sup>240</sup>

In the SWD, the Commission presents this objective as linked to the problem of the absence of a broad and flexible mechanism for solidarity, in which 'relocation is not the only effective response to deal with mixed flows.'<sup>241</sup> Presented as such, the link between problem and objective seems logical. However, it is unclear how the objective of establishing mandatory and flexible solidarity mechanisms corresponds to the problem of intense political disagreement over solidarity.<sup>242</sup>

Moreover, flexible solidarity in the new pact is not only an objective in its own right, but it is also proposed as contributing towards a 'more effective return policy' (solidarity contributions can be made in the form of financial or other assistance focused on infrastructure and facilities that may be necessary to improve the enforcement of returns or providing material or transport means for carrying out operations).<sup>243</sup> As the relationship between solidarity and effective returns is not further explained, it is difficult to review the objectives of the new pact on this point.

### 3.5. Simplified and more efficient rules for robust migration management

The objectives of simplification, robustness and efficiency of migration management are not clearly defined, nor can they be clearly distinguished from a 'more efficient, seamless and harmonised migration management system'. Simplification of rules, in any case, can be seen as an operational objective.

From Section 5.3. of the SWD, it is apparent that these objectives pertain specifically to the mechanism for the attribution of responsibility for applications for asylum among Member States.

<sup>237</sup> [COM\(2020\) 609](#), p. 5.

<sup>238</sup> European Commission, [COM\(2020\) 610](#), 'Proposal for a Regulation of the European Parliament and the Council on asylum and migration management and amending Council Directive (EC) XXX/XXX [Asylum and Migration Fund]', Explanatory memorandum.

<sup>239</sup> [COM\(2020\) 610](#), p. 11; [COM\(2020\) 609](#), p. 13. Fairness in respect to solidarity is different from fairness towards third country nationals in the Pact.

<sup>240</sup> See in particular [SWD\(2020\) 207](#), p. 75. Note that this way of **measuring** solidarity and responsibility sharing should not be confused with a narrow way of **defining** the concept.

<sup>241</sup> [SWD\(2020\) 207](#), p. 69.

<sup>242</sup> See Chapter 2 of this study.

<sup>243</sup> [COM\(2020\) 610](#).

The SWD, however, fails to make general or specific objectives explicit.<sup>244</sup> Instead, it delves immediately into the various measures proposed to simplify procedures and making them more efficient. The objectives of the revised mechanism for responsibility are scattered over the relevant section of the SWD (or across the entire document). A close reading of the SWD and the relevant proposal reveals that the objectives consist in (1) procedural efficiency (2) limiting secondary or unauthorised movements; (3) countering abuse;<sup>245</sup> and (4) effectiveness of the procedure, therewith guaranteeing quick access to the examination procedure and protection for those in need of it.<sup>246</sup>

In the particular context of responsibility sharing, procedural efficiency corresponds to the Treaty-based goal of 'efficient management of migration flows'.<sup>247</sup> This general objective is made more specific by pointing out that it should result in an alleviation of the administrative burden on Member States<sup>248</sup> and a smooth operation of the procedure.<sup>249</sup> These criteria can be measured. However, efficiency cannot be the overarching objective for rules on responsibility-sharing if efficiency is not defined with regard to a clear objective.<sup>250</sup>

As regards countering secondary or unauthorised movements and abuse of the rules, the findings presented in Section 3.4 apply. In particular, it is unclear how these objectives can be translated into criteria against which the success of the proposed measures can be assessed. Moreover, it is not clear how they relate to the problem of the lack of uniform implementation and application of existing EU law at the domestic level (in particular differences in reception or recognition), or the problem of misapplication of EU law (in particular inhuman or degrading conditions upon arrival). The objective of ensuring quick access to the procedure and protection for those who need it will be reviewed under Section 3.7.

### 3.6. Targeted procedures and mechanisms to address extreme crisis situations and situations of force majeure

When it comes to crisis situations and situations of force majeure, the Commission presents the objective of the new pact as follows: 'to provide for the necessary adaptation of the rules [in other instruments] in order to ensure that Member States are able to address situations of crisis and force majeure [...]'.<sup>251</sup> This objective is affirmed in the Explanatory Memorandum on the Regulation.<sup>252</sup> Here the distinction between objectives and measures is ambiguous. Merely enabling States to address situations of crisis and force majeure is an operational objective, but the general or specific

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<sup>244</sup> This would be required for an impact assessment as stipulated in the Better Regulation Guidelines.

<sup>245</sup> 'The rules on responsibility for examining an application for international protection should be refined to make the system more efficient, discourage abuses and prevent unauthorised movements.' See [COM\(2020\) 609](#), p. 6.

<sup>246</sup> [COM\(2020\) 610](#), p. 23.

<sup>247</sup> Article 79(1) [TFEU](#).

<sup>248</sup> [SWD\(2020\) 207](#), p. 81.

<sup>249</sup> [COM\(2020\) 610](#), p. 23.

<sup>250</sup> Against this context it is particularly striking that the Commission does not refer to fair sharing of responsibility (as it does in the context of solidarity), but only refers to simplified and efficient rules, fairness to migrants and preventing abuse. Thus, the extent to which the objective of sharing of responsibility corresponds to the objective of a fair outcome for the Member States remains implicit and undefined.

<sup>251</sup> DG Home, [website on the new pact on Migration](#).

<sup>252</sup> The overall objective of the proposal is to provide for the necessary adaptation of the rules on asylum and return procedures (Asylum Procedures Regulation and Return Directive 7) as well as of the solidarity mechanism established in the Regulation on Asylum and Migration Management, in order to ensure that Member States are able to address situations of crisis and force majeure in the field of asylum and migration management within the EU. See [COM\(2020\) 613 final](#).

objectives (*what* is to be achieved by enabling states to address such crises) are not presented clearly.

A close reading of the Explanatory Memorandum of the Crisis Regulation together with the SWD reveals that the specific objectives of the Pact in this area are (1) efficiency of procedures in situations of crisis; (2) effective protection of persons in need in situations of crisis; (3) Solidarity across the EU in situations of crisis; (4) combating or preventing irregular migration in situations of crisis/countering secondary movements.<sup>253</sup> Most of these objectives have been discussed above, except for effective protection of persons in situations of crisis. The objective of effective protection of individual rights will be discussed below. Specifically, with regard to efficiency, the Commission aims at ensuring that the 'competent authorities under strain to exercise their tasks diligently and cope with significant workload writes efficiency of procedures in situations of crisis.'<sup>254</sup>

Some considerations need to be made with regard to the question of whether the overall objective as formulated is relevant in relation to the problems identified by the Commission. When the problem is identified as the lack of targeted mechanisms to address the crisis, defining the objective as establishing such a mechanism amounts to circular reasoning. Admittedly, the Commission specifies the problem as the lack of rules to deal with crisis situations of mass influx, which may render a Member State's asylum or reception system non-functional and has serious consequences on the functioning of the overall CEAS.<sup>255</sup> The objectives of more efficient procedures, increased solidarity, effective protection and preventing irregular migration are relevant to address the problems of a non-functional asylum or reception system and malfunctioning of the CEAS. However, it should be noted that they may not always be relevant for problems related to the root causes of crisis.

### 3.7. A fairer and more effective system to reinforce migrants and asylum seekers' rights

Under this heading, the Commission identifies the objective to build a well-functioning CEAS that fully respects the fundamental rights of migrants and asylum seekers. This objective corresponds to the Treaty-based goal of ensuring compliance with the principle of non-refoulement in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties.<sup>256</sup> It is also in line with the objective of the CEAS to ensure *fair* procedures.

This objective is specific, as the Commission draws attention to a number of rights and safeguards, such as the right to family reunification; the best interest of the child; the rights of vulnerable persons; the right to human dignity; the prohibition of torture and inhuman or degrading treatment or punishment; the right to asylum; the protection from collective expulsion and refoulement; non-discrimination; the right to a high level of human health protection; and the right to procedural safeguards.<sup>257</sup> As such, the criteria against which the success of the measures can be assessed are clear. In a general sense, this objective corresponds to the problems that migrants encounter in accessing their rights under EU and international law.

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<sup>253</sup> [COM\(2020\) 610](#).

<sup>254</sup> [COM\(2020\) 613 final](#), p. 3.

<sup>255</sup> [SWD\(2020\) 207](#).

<sup>256</sup> Article 78(1) [TFEU](#). See also Articles 18 and 19 of the Charter.

<sup>257</sup> [SWD\(2020\) 207](#), pp. 84-86.

However, it is not explained in detail how this objective relates to specific problems that migrants encounter (loss of life at the sea, inadequate reception and accommodation at external borders and irregularity pending return decisions, ineffective asylum procedures). Another instance from which it appears that the relationship between objectives and problems has not been considered properly is the measures presented under this objective foresee *limitations to the rights and safeguards for migrants* in order to 'harmonise and speed up the different procedures'.<sup>258</sup>

### 3.8. Further objectives

Further objectives that should be considered for achieving the overall objective to build a fair, efficient and sustainable migration and asylum management system that respects fundamental rights under EU and international law, including at the EU external borders, are:

(1) Ensure that rules are applied in an equal manner by all Member States at all levels of regulation; this objective corresponds to the problem of the implementation gap.<sup>259</sup> This objective is not mentioned separately in the SWD, which can be traced back to the fact that the Commission does not distinguish clearly between problems related to implementation at the Member State level and those related to the lack of harmonised rules.

(2) Establishing legal pathways for migration, and especially for refugees who attempt to reach the EU safely. This has been presented as a key objective by the majority of those interviewed amongst multilateral organisations and NGOs.<sup>260</sup> It has been coupled with the need to address the root causes of immigration and the establishment of a sustainable system to address the external dimension of EU policies.<sup>261</sup>

(3) Establishing a sustainable return policy that also resolves the status of unremovable migrants, i.e. migrants that cannot be returned to their countries of origin. This objective corresponds to the problem of an ineffective return policy and the problems that migrants encounter in accessing their rights. This has been highlighted by interviewees from both multilateral organisations and NGOs.<sup>262</sup>

### 3.9. Conclusion

Table 3.0-1 below provides an overview of the assessment of the objectives of the new pact, as analysed in this chapter and in particular of whether the objectives have been defined clearly by the Commission; whether adequate benchmarks to measure the success of the policy intervention with

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<sup>258</sup> [SWD\(2020\) 207](#), p. 84. For example, limitations are proposed to: the scope of the right to an effective remedy, the suspensive effect of appeals, and the right to material reception conditions. We come back to these specific measures in Chapter 6. In the Section in the SWD, pertaining to a fairer system to protect migrants' rights, the intervention logic seems particularly confused.

<sup>259</sup> For key implementation gaps, see ECRE, [Making the CEAS work, Starting Today; ECRE'S Identification of Key Implementation Gaps in the CEAS and recommendations for EU measures to make the Common European Asylum System function effectively](#), 2019.

<sup>260</sup> Migration Pact Impact Assessment interview with international NGO representative (anonymous), Ecorys, 2021; Migration Pact Impact Assessment interview with IOM Greece, Ecorys, 2021; Migration Pact Impact Assessment interview with Meijers Committee, Ecorys, 2021; Migration Pact Impact Assessment interview with Migration Policy Centre, Ecorys, 2021; Migration Pact Impact Assessment interview with international NGO representative (anonymous), Ecorys, 2021; Migration Pact Impact Assessment interview with DG Migration and Home Affairs, Ecorys, 2021; Migration Pact Impact Assessment interview with Italian Refugee Council, Ecorys, 2021; Migration Pact Impact Assessment interview with Borderline Sicilia, Ecorys, 2021.

<sup>261</sup> EPRS (April 2021), [Briefing: the External Dimension of the new pact on Migration and Asylum: a Focus on Prevention and Readmission](#).

<sup>262</sup> Migration Pact Impact Assessment interview with international NGO representative (anonymous), Ecorys, 2021; Migration Pact Impact Assessment interview with IOM Greece, Ecorys, 2021.

regard to the identified objectives are provided; and whether there is a clear link between problem and objective in the new pact.

Table 3.0-1 – Assessment of the objectives of the new pact

Objectives in the SWD/Pact	Objective clearly defined?	Criteria that can be used to measure success?	Does the objective correspond to the identified problem?
Efficiency and effectiveness of procedures	No	Indications of such criteria are scattered across the SWD, except when it comes to the Dublin system (alleviation of administrative burden and a smooth procedure). Return rates are mistakenly presented as an indicator of efficiency (p. 44 SWD).	Difficult to say in the absence of a clear definition. Presumably, it corresponds to the lack of an integrated approach at EU level. However, it is not clear how the objective relates to the implementation gap.
Countering secondary/unauthorised movements (including asylum shopping)	No	No, as acknowledged by the Commission (p. 22 SWD).	Difficult to say in the absence of a clear definition. Presumably, it corresponds to the lack of an integrated approach at EU level. However, it is not clear how the objective relates to the implementation gap.
Preventing abuse or misuse	No. It is unclear how abuse relates to the filing of applications for international protection that are rejected by the Member States, or to applicants leaving the Member State of first entry.	No	Difficult to say in the absence of a clear definition. Presumably, it corresponds to the lack of an integrated approach at EU level. However, it is not clear how the objective relates to the implementation gap.
Further harmonisation of procedures	Yes, but harmonisation is a measure to achieve other objectives (countering inefficiencies and secondary movements).	Yes	Yes, lack of an integrated approach at EU level. Note that it is not clear how it relates to the implementation gap.
Mandatory and flexible solidarity	Yes, giving effect to the principle of solidarity. Solidarity is also put forward as a	Yes	Yes, but it does not correspond to the problem of political disagreement over solidarity.

Objectives in the SWD/Pact	Objective clearly defined?	Criteria that can be used to measure success?	Does the objective correspond to the identified problem?
	measure to achieve other objectives (i.e. effective return policy).		
Sharing of responsibility for asylum applications	Yes. But to what extent the sharing should be fair is not acknowledged by the Commission except when discussing Dublin III. Other objectives are countering abuse and secondary movements.	No	Yes. Absence of functioning system of solidarity and responsibility sharing.
Mechanism to address crisis and force majeure	No. Such mechanism appears to be a measure to achieve other objectives (efficient procedures, increased solidarity, effective protection and preventing irregular migration).	No, except for solidarity (see for the other objectives above).	Yes, seeing that the problem is described as the lack of a mechanism to address crisis of force majeure. Other objectives correspond to some of the identified problems but not to additional problems such as the implementation gap, problems related to the external dimension and the root causes of crisis.
Fair procedures/ effective protection of migrants rights	Yes. But there is some confusion as regards the link between objectives, problems, and measures, seeing that the Commission also alludes to the objective to 'harmonise and speed up the different procedures.'	Yes. A number of rights and safeguards are clearly specified.	Yes. The difficulties that migrants experience in accessing their rights under EU and international law.

Source: Ecorys, 2021.

Overall, we conclude that the new pact's objectives are not well defined and that often clear criteria for evaluating the effectiveness of EU action are lacking. This is especially true with regard to achieving efficiency, minimising secondary movements, and preventing abuse or misuse of the asylum system. The Commission does not make a clear distinction between objectives and measures/solutions. The objective of a fairer and effective system to strengthen migrants' and asylum seekers' rights is obvious, and it corresponds to the difficulties migrants face in exercising their rights under EU law. There is, however, no clear justification for combining this objective with the additional objective of 'speeding up' procedures. Moreover, there is a lack of detail on how this objective relates to the specific human rights challenges faced by migrants and asylum seekers (e.g. continued violations of international law in the context of SAR and at borders; Member State non-compliance with existing rules of the CEAS, forcing migrants into substandard living conditions and irregularity; ineffective asylum procedures). Finally, while the new pact's objectives of procedural efficiency and effectiveness, solidarity, countering secondary movements, preventing abuse, combating illegal migration and cooperation on return, and effective protection of migrants' rights correlate to the problems identified by the Commission, they do not always correspond to other evidenced existing problems, most notably the implementation gap of the CEAS as a whole.

## 4. Subsidiarity and proportionality assessment

### Key findings

- Article 77 (2)(b) TFEU is not an adequate legal basis for the mandatory screening of persons apprehended within the territory of the Member States, and an additional legal basis to the proposal for the screening regulation should be added. Additionally, the legal basis of the RAMM would be bolstered by a reference to Article 80 TFEU;
- Most of the problems that the new pact aims to address are cross-border by nature and cannot be addressed by the Member States alone. Therefore, the EU has a right to act;
- The cross-border nature of the problems such as secondary movements, abuse of the asylum procedure, mixed flows is not always sufficiently qualified or quantified;
- Especially in view of the lack of an integrated approach and persistent implementation problems, the need and European added value of reforming the CEAS is evident;
- The choice of regulations is understandable against the background of current problems of implementation. However, it overlooks the fact that implementation cannot be equated with transposition;
- Leaving significant scope for discretion for Member States in the proposed instruments sits uneasily with the justification for the choice of regulations (lack of an integrated approach).

### 4.1. Introduction

In this chapter, we will assess whether the EU has the competence to address the identified problems, and we review whether the use of these competences in the legislative proposals presented is in accordance with the principles of subsidiarity and proportionality.<sup>263</sup> Compliance with subsidiarity and proportionality can only be fully verified once objectives are set and the impacts of alternative options assessed.<sup>264</sup> However, some limitations for this exercise in the context of this study emerge. First, some objectives of the new pact have not been clearly defined, as highlighted in Chapter 3. Secondly, this study does not explore alternative options to those presented. Consequently, a full analysis of compliance with subsidiarity and proportionality is beyond the scope of this research. This chapter therefore focuses on providing a limited analysis of subsidiarity and proportionality, as a final verification of whether these principles have been complied with will only be possible once all relevant information is collected and the analysis of impacts is completed (see Chapter 7). Hence, most aspects related to the European added value of the proposals are also discussed in Chapter 7.<sup>265</sup>

### 4.2. Legal basis for the proposed instruments

The instruments proposed in the new pact are based on the provisions in Chapter 2 of Title V (area of freedom, security and justice) of the TFEU, providing for common policies on border checks, asylum and immigration. In the following sections we will analyse the Commission's legal bases for

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<sup>263</sup> Article 5 [TEU](#) and the Protocol.

<sup>264</sup> See European Commission, [Better Regulation Guidelines](#), Chapter 3, p. 19: 'Compliance with subsidiarity and proportionality, for example, can only be fully verified once objectives are set and the impacts of alternative options assessed.'

<sup>265</sup> This approach is also called for in view of constraints on the length of this study.

each of the instruments under review in this study. This is a key step, as the lack of an adequate legal basis would imply that the EU would not be able to address the identified problems.

#### 4.2.1. Legal basis for the RAMM

The RAMM repeals and replaces Dublin III<sup>266</sup> by improving the rules on responsibility for examining an application for international protection. It also widens the scope of the previous instrument by introducing a broader approach to solidarity.<sup>267</sup> The RAMM furthermore includes provisions to strengthen the return of irregular migrants, and provides new possibilities for Member States to assist each other in carrying out returns in the form of return sponsorship.

Therefore the appropriate legal basis for this instrument is Article 78 para 2 under (e) and Article 79 para 2 under (c) TFEU, as indicated in the Proposal.<sup>268</sup> These provisions provide the EU with the competence to enact legislation on: criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; and on illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation.

The Commission underlines that 'a comprehensive approach also means a stronger, more sustainable and tangible expression of the principle of solidarity.'<sup>269</sup> It could therefore have added Article 80 TFEU as a legal basis for the RAMM. Article 80 determines that whenever necessary, the instruments adopted in this policy area shall contain appropriate measures to give effect to the solidarity principle.<sup>270</sup> The legal basis of the RAMM would be bolstered by a reference to Article 80 TFEU because solidarity with regard to return is a novel development in EU policy-making.<sup>271</sup>

#### 4.2.2. Legal Basis for the screening regulation<sup>272</sup>

The screening regulation establishes a pre-entry screening procedure that applies to all third country nationals who are present at the external border without fulfilling the entry conditions in the Schengen Borders Code, or after disembarkation following a SAR operation.<sup>273</sup> The Commission indicates Article 77 (2)(b) TFEU as the legal basis of the proposal.<sup>274</sup> This provision provides for measures concerning the checks to which persons crossing external borders are subject.

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<sup>266</sup> [Regulation \(EU\) No 604/2013](#).

<sup>267</sup> [Regulation \(EU\) No 604/2013](#).

<sup>268</sup> [COM\(2020\) 610](#), (paragraph 2).

<sup>269</sup> [COM\(2020\) 610](#), p.1.

<sup>270</sup> On whether Article 80 TFEU can provide a legal basis for measures, see D. Vanheule, J. van Selm and C. Boswell, [The implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States in the field of border checks, asylum and immigration](#), Study. EP Directorate General for Internal Policies, Policy Department C: Citizen's rights and Constitutional Affairs (Civil Liberties, Justice and Home Affairs), 2011.

<sup>271</sup> The European Parliament 'has repeatedly taken the view that Article 80 TFEU provides a joint legal basis in the areas of asylum, migration and borders along with Articles 77 to 79 TFEU.' However, within the EU, there is no clear consensus on whether Article 80 TFEU is a legal basis provision. See EPRS Briefing, [Solidarity in EU Asylum Policy](#), March 2020. This lack of agreement on Article 80 is in itself illustrative for the difficulties related to legislating on solidarity.

<sup>272</sup> [COM\(2020\) 612](#).

<sup>273</sup> EASO Asylum Report 2021.

<sup>274</sup> With regard to the amendments to the regulations establishing different databases (VIS, EES, ETIAS) and to the regulation establishing interoperability, the screening proposal is additionally based on Article 77(2)d of the TFEU, which concerns the development of a policy with a view to any measure necessary for the gradual establishment of an integrated management system for external borders. These measures are outside the scope of this IA.

However, the screening proposal also provides for the mandatory screening of persons apprehended *within* the territory of the Member States if there are indications that they crossed external borders without authorisation.<sup>275</sup> It is clear that Article 77 (2)(b) TFEU cannot provide the legal basis for such measures, as these do not concern 'checks of persons crossing external borders'.<sup>276</sup> Screening within the territory of the Member States 'aims to contribute to protecting the Schengen area and ensure efficient management of irregular migration'.<sup>277</sup> As such, another legal basis to the Proposal should have been added, namely Article 79(2)(c) TFEU, which provides for measures in the area of illegal immigration and unauthorised residence.<sup>278</sup>

#### 4.2.3. Legal Basis for the Amended Asylum Procedure Regulation (APR)<sup>279</sup>

As this instrument provides for common rules on asylum procedures, its legal basis is correctly identified as Article 78(2)(d) TFEU, providing for the adoption of measures for common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status.<sup>280</sup> As the APR also contains rules concerning the return of rejected asylum seekers (joint return and negative asylum decisions and seamless asylum and return border procedures), an additional legal basis is required. The Commission correctly identifies it as Article 79 (2)(c) TFEU.

#### 4.2.4. Legal basis for the crisis and force majeure regulation<sup>281</sup>

This Regulation aims to ensure that Member States are able to address situations of crisis and force majeure in the field of asylum and migration management within the EU.<sup>282</sup> For this purpose, it provides for the necessary adaptation of the rules on asylum and return procedures in the APR and the Return Directive, as well as of the solidarity mechanism established in the RAMM. The legal basis is therefore identical to that which applies for the APR, the Return Directive and the RAMM (Article 78 (2)(d) and (e) and Article 79 (2)(c) TFEU.<sup>283</sup> The Regulation also provides for rules on the granting of immediate protection status in situations of crisis.<sup>284</sup> Therefore, it is correctly based on an additional legal basis: Article 78 (2)(c), providing for a common system of temporary protection for displaced persons in the event of a massive inflow.

### 4.3. Subsidiarity assessment

In the area of freedom, security and justice, the EU **shares competence** with the Member States. In line with the principle of subsidiarity, we assess here whether the EU and not the Member States alone should act. In addressing this question, we first discuss the subsidiarity of the new pact as a

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<sup>275</sup> [COM\(2020\) 612](#), Article 6.

<sup>276</sup> See *mutatis mutandis* Case C-47/15, *Affum*, EU:C:2016:408; and Case C-444/17, *Arib*, ECLI:EU:C:2019:220 (persons apprehended within the territory or when crossing an internal border cannot be seen as apprehended in connection with the crossing of an external border).

<sup>277</sup> See [COM\(2020\) 612](#), p. 2.

<sup>278</sup> It is noteworthy that the EU legislature considers that the initial apprehension of these persons is governed by national law (Recital 17 of the Return Directive, retained in in the Proposal for the Recast for the Return Directive, Recital 31). See also Case C-329/11, *Achughbabian*, ECLI:EU:C:2011:807, paras 30 and 31.

<sup>279</sup> [COM\(2020\) 611](#).

<sup>280</sup> The same basis was used in the 2016 proposal for an Asylum Procedure Regulation, and for the current Asylum Procedures Directive.

<sup>281</sup> [COM\(2020\) 613](#).

<sup>282</sup> RAMM, [COM\(2020\) 610](#).

<sup>283</sup> See the discussion above.

<sup>284</sup> RAMM, [COM\(2020\) 610](#).

whole and then assess for each proposal separately whether the problem addressed has transnational aspects which cannot be adequately addressed by individual Member State action, and whether action at EU level would potentially produce greater benefits compared to action taken solely at the level of the Member States.<sup>285</sup>

### 4.3.1. Subsidiarity of the new pact as a whole

When it comes to the new procedures proposed by the Pact – two of the four main building blocks of the new pact – pre-entry procedures and mechanisms for responsibility sharing and solidarity, including their application in times of crisis – almost all of the publicly available data, as well as the majority of those interviewed in the context of this study, indicates that many of the problems faced by the EU in this policy domain are either related to a lack of uniform application and implementation of EU law (border procedures) or due to the lack of adequate rules and mechanisms (solidarity sharing and responsibility). There are clear legal bases in the TFEU to address these problems (Articles 77, 78, 79 and 80 TFEU). Moreover, these problems are **cross-border by nature** and cannot be addressed by the Member States alone. Therefore, the EU has a right to act in this context.<sup>286</sup> The added value of a reform of the CEAS is evident in view of these cross-border problems. In view of the lack of an integrated approach across the EU and persistent implementation problems with regard to current EU law, as discussed in Chapter 2, EU action is called for. However, we note that in some instances, the cross-border nature of the problems is **not sufficiently qualified or quantified** (secondary movements, abuse of the asylum procedure, mixed flows).

### 4.3.2. Subsidiarity of the RAMM – a common approach to a common European problem

The RAMM aims to address the problems related to inefficiencies in the Dublin system and the absence of a broad and flexible system for solidarity.<sup>287</sup> The current unequal burden on Member States, inadequate and a poorly recognised distribution mechanisms for applicants for international protection, and insufficient control of secondary movements, are problems that are cross-border by nature.<sup>288</sup> Accordingly, Member States cannot address these challenges alone, and the EU has a right to act.

Consultations with the EU institutions, Member States and civil society have been carried out to identify these challenges.<sup>289</sup> Moreover, in the RAMM, the Commission provides a detailed statement supported by quantitative and qualitative data, which supports the conclusion that the challenges can be best addressed at EU level. Thus, attention is drawn to the underperformance of the relocation scheme, insufficient solidarity for persons disembarked following SAR, and inefficiencies in the Dublin system, with reference to a number of studies that have been carried out over the

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<sup>285</sup> [SWD\(2017\)350](#), Better Regulation Guidelines, p. 19. See also [COM\(2018\) 703](#).

<sup>286</sup> European Commission, Areas of EU Action, 3 principles.

<sup>287</sup> RAMM, [COM\(2020\) 610](#).

<sup>288</sup> See Subsidiarity and Proportionality Grid Applied to the new pact on Migration and Asylum proposals, COR-2021-00558-00-00-TCD-TRA (DE) 2/7. See Migration Pact Impact Assessment Country Research for Sweden on the basis of desk research and interviews with the Swedish Ministry of Justice, the Swedish Migration Agency and the Swedish Refugee Law Centre, Ecorys, 2021; Migration Pact Impact Assessment Country research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021.

<sup>289</sup> European Commission, [SWD\(2020\) 207](#), paragraph 1.4.

years.<sup>290</sup> Quantification specifically with regard to unauthorised movements is deficient, however, with the Commission pointing out that it is currently not possible to obtain an accurate picture of such movements.<sup>291</sup>

### 4.3.3. Subsidiarity of the screening regulation: Responding to 'mixed flows'

The Commission argues that screening helps to safeguard a comprehensive, integrated and seamless approach to migration. Screening ensures that people's identity and any health and security risks are quickly established upon arrival at an external border. Third-country nationals who do not fulfil the entry conditions or after SARs are swiftly referred to the applicable procedure. The screening regulation aims to address the lack of an integrated approach at EU level and to tackle the problem of 'mixed flows' arriving at external borders.<sup>292</sup>

External border control is carried out in the interest of all Member States and the EU as a whole.<sup>293</sup> In the area without internal borders, external border control has clear cross-border implications.<sup>294</sup> The EU consequently has a right to act. Nevertheless, when it comes to the problem of 'mixed flows', it is doubtful whether the qualitative and quantitative data provided by the Commission warrant the conclusion that *new* legislation is called for.<sup>295</sup>

Harmonised rules on screening have clear potential for producing benefits over Member State action as regards a more uniform application of the border procedure in the Member States and as regards vulnerability checks and health checks for persons arriving at the external border.<sup>296</sup>

### 4.3.4. Subsidiarity of the Amended Asylum Procedure Regulation (APR) – reducing incentives for 'asylum shopping and unauthorised movement'

According to the Commission, the new procedures introduced by the new pact should be governed by the same rules, regardless of the Member State applying them, in order to ensure equity in treatment, clarity and legal certainty for the individual.<sup>297</sup> It argues that Member States cannot individually establish common rules that will reduce incentives for asylum shopping and unauthorised movements.<sup>298</sup> While the lack of an integrated approach is indeed a problem that has cross-border implications, we have already pointed out in Chapters 2 and 3 that 'asylum shopping' and unauthorised movements remain poorly qualified and quantified by the new pact. Therefore, the added value of the APR in countering these problems is difficult to assess. This is particularly so as in the area of border procedures (one of the most significant changes as compared to the 2016 Proposal), the problems encountered by the EU are not primarily caused by a lack of harmonised

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<sup>290</sup> RAMM, [COM\(2020\) 610](#) Explanatory Memorandum. See also [SWD\(2020\) 207](#), in particular Chapter 2.

<sup>291</sup> [SWD\(2020\) 207](#), Para 3.3.3.

<sup>292</sup> Security concerns in external border control are addressed in the Screening Regulation, but security threats do not feature as problems in the Commission's SWD about the new pact. Security concerns are mostly addressed with regard to the collection of data, which will be left outside of the scope of the impact assessment.

<sup>293</sup> CJEU – ANAFE.

<sup>294</sup> See also the cross-border implications of the COVID-19 pandemic.

<sup>295</sup> Chapter 3, and see also Violeta Moreno-Lax et al, '[The EU Approach on Migration in the Mediterranean](#)', IPOL, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, June 2021, p. 26.

<sup>296</sup> EPRS, '[Asylum procedures at the border](#)', EPRS, European Parliament, November 2020.

<sup>297</sup> [SWD\(2020\) 207](#).

<sup>298</sup> [COM\(2020\) 611](#), Explanatory Memorandum.

rules, but rather by a lack of proper implementation and application of these rules at the domestic level.<sup>299</sup>

#### 4.3.5. Subsidiarity of the crisis and force majeure regulation – introducing special rules for crisis

The proposal for a Regulation on the management of crisis situations covers exceptional situations of a mass influx of third-country nationals or stateless persons arriving irregularly in a Member State. The scale and nature of such a mass influx would render a Member State's asylum, reception or return system non-functional. The Regulation also covers situations where there is an imminent risk of such arrivals, which risk having serious consequences for the functioning of the CEAS and the migration management system of the Union. These are problems that have clear **cross-border implications in the area without internal border control**. The EU accordingly has a right to act. The events in 2015, to which Member States responded with national measures which risked jeopardising the functioning of the internal market, show that action at the EU level has clear benefits over individual action by Member States.<sup>300</sup>

### 4.4. Proportionality of the choice of legal instruments

The proportionality of the measures proposed can only be assessed fully after the measures (Chapter 5), and their impacts (Chapter 6) are set out. In this Section, therefore, we limit ourselves to an examination of whether the **choice made in terms of legal instruments** is appropriate and proportionate to the identified objectives.<sup>301</sup>

All the proposed instruments under review are regulations. The choice for this legal instrument is in line with the objective of an **integrated European approach**. Moreover, regulations may remedy problems as regards implementation, which have been observed widely in the application of the rules contained in the CEAS.

The RAMM replaces Dublin III, which is a regulation itself.<sup>302</sup> Screening contributes to the rules on external border control in the Schengen Borders Code, which is also a regulation. As checks in the screening should be performed according to uniform standards, directly applicable provisions are called for.<sup>303</sup> The new pact does not change the choice of legal instrument for asylum procedures which was put forward in the 2016 Proposal for the APR. Then, the Commission justified the repealing and replacement of a Directive with a Regulation by pointing out that 'the degree of harmonisation of national procedures for granting and withdrawing international protection that was achieved through Directive 2013/32/EU has not proven to be sufficient to address differences in the types of procedure used, the time-limits for the procedures, the rights and procedural guarantees for the applicant, the recognition rates and the type of protection granted.'<sup>304</sup> According

<sup>299</sup> See for example the EP report on border procedures. Refer also to data obtained through the interviews. 'Secondary movements' and 'asylum shopping' are also related to poor accommodation and reception.

<sup>300</sup> Sergio Carrera, Steven Blockmans, Daniel Gros and Elspeth Guild, *The EU's Response to the Refugee Crisis, Taking Stock and Setting Policy Priorities*, CEPS, 16 December 2015.

<sup>301</sup> See also European Commission, *Better Regulation 'Tool #5 legal basis, subsidiarity and proportionality'*, p. 30: one of the questions helpful 'in assessing whether a measure adheres to the principle of proportionality' is whether 'the form of Union action (choice of instrument)[is] as simple as possible, and coherent with satisfactory achievement of the objective and effective enforcement'.

<sup>302</sup> [COM\(2020\) 610](#), paragraph 2.6.

<sup>303</sup> [COM\(2020\) 612](#), paragraph 2.

<sup>304</sup> [COM\(2016\) 467](#).

to the Commission, only a regulation can provide the necessary degree of uniformity and effectiveness needed in the application of procedural rules in Union law on asylum.<sup>305</sup> Similar arguments are used with regard to the choice of a regulation for establishing rules on crisis and force majeure, with the Commission also recalling that this instrument provides for derogations to the APR and the RAMM, instruments which are both regulations.<sup>306</sup>

Regulations are an adequate means to counter some of the problems that the EU encounters (see Chapter 3), seeing that many of these problems can be traced back to the implementation gap. That being said, three concerns stand out when assessing the appropriateness of the choice for regulations. In the first place, the **lack of an integrated European approach cannot be solved primarily with solving issues relating to transposition**. The latter is only 'one part of the implementation process, followed by the application and enforcement of legal measures.'<sup>307</sup> Secondly, **administrative and procedural complexity may hinder the achievement of an integrated European approach**. As we will set out in the following Chapters, the new pact introduces a number of procedures characterised by such administrative and procedural complexity. Such complexity is difficult to reconcile with the need to ensure uniform standards across the EU, which provides the justification for a choice for Regulations. Thirdly, as we will discuss in the following chapters, **regulations allow Member States considerable discretion**, leaving crucial issues that raise key implementation challenges, such as the use of detention in the screening procedure, to national law. This is hardly in line with the choice of adopting Regulations; more importantly, it also may hinder achieving the objective of an integrated European approach.<sup>308</sup>

## 4.5. Conclusion

Table 4.0-1 below provides an overview of our assessment of the subsidiarity and proportionality of the proposed measures, as outlined in the previous sections.

Table 4.0-1 – Subsidiarity and proportionality assessment of the four proposals

	Screening	RAMM	APR	Crisis Regulation
Is the legal basis as indicated by the Commission adequate?	Screening <i>within</i> the territory of the Member State has no appropriate legal basis. Legal basis for screening at external borders is appropriate.	Yes, but reference to Article 80 TFEU is lacking	Yes	Yes
Are the problems addressed cross-border by nature?	Yes, but mixed flows are not always sufficiently qualified or quantified.	Yes, but secondary movements are not always sufficiently	Yes, but abuse of the asylum system not always sufficiently	Yes

<sup>305</sup> Ibid.

<sup>306</sup> [COM\(2020\) 613](#).

<sup>307</sup> Hurka, S., and Steinebach, Y. (2021) [Legal Instrument Choice in the European Union](#). *JCMS: Journal of Common Market Studies*, 59: 278– 296.

<sup>308</sup> The Pact as a whole also has a range of recommendations which may influence the overall assessment of the proportionality and subsidiarity of the Pact. The scope of this IA does not allow us to address these recommendations, and further research may be needed on this point.

	Screening	RAMM	APR	Crisis Regulation
		qualified or quantified.	qualified or quantified.	
Does EU action provide benefits over Member State action?	Yes, as regards health and vulnerability checks at external borders, and with regard to assessing the suitability of the use of a border procedure.	Yes, especially as regards the governance framework.	Yes, uniform rules on asylum procedures are required across the Member States.	Yes, lack of EU action has shown to exacerbate problems.
Is the choice of instrument proportionate?	Yes, in view of persistent problems with regard to implementation of existing rules.	Yes, in view of persistent problems with regard to implementation of existing rules.	Yes, in view of persistent problems with regard to implementation of existing rules.	Yes, in view of persistent problems with regard to implementation of existing rules.

Source: Ecorys, 2021.

The problems that the new pact aims to address are cross-border by nature and cannot be addressed by the Member States alone. Therefore, the EU has a right to act. However, the cross-border nature of some of the problems which the new pact aims to remedy is not always sufficiently qualified or quantified. This is in particular the case for secondary movements, the abuse of the asylum procedure and mixed flows.

Especially in view of the lack of an integrated approach and persistent implementation problems with regard to the CEAS, the need for and the European added value of reforming the CEAS is evident. The choice of regulations as a legal instrument is understandable against the background of current problems of implementation. However, it overlooks that implementation cannot be equated with transposition. Moreover, leaving significant scope for discretion for Member States in the proposed regulations sits uneasily with the justification for the choice of regulations, which consists in the lack of an integrated European approach.

In addition, proportionality concerns are raised by administrative and procedural complexity introduced by the four proposals, which in turn may hinder the achievement of an integrated European approach. For the Commission, proportionality 'means delivering [...] ambitious policies in the simplest, least costly way and avoiding unnecessary red-tape. It is about carefully matching the intensity of the proposed measure with what is to be achieved.'<sup>309</sup> As will be discussed in the following Chapters, the matching exercises required for giving expression to solidarity, the transfers under the responsibility sharing mechanism and the return sponsorship introduce a degree of administrative complexity of which it is difficult to argue that it lives up to this standard.

The RAMM gives expression to the new pact's 'overarching principles of solidarity and a fair sharing of responsibility'. As such, the legal basis of this instrument would be bolstered by a reference to Article 80 TFEU. This may be complicated due to the lack of consensus amongst the institutions on whether Article 80 is a legal basis provision. This lack of consensus in itself is indicative of the political disagreements over solidarity in the EU. Article 77 (2)(b) TFEU is not an adequate legal basis for the mandatory screening of persons apprehended within the territory of the Member States, seeing that such internal screening is not a measure concerning the checks to which persons crossing external borders are subject.

<sup>309</sup> [COM\(2018\) 703 final](#).

## 5. Analysis of the main elements of the new pact on migration and asylum

### Key findings

- The main novel elements that the pact proposes with regard to pre-entry procedures are mandatory screening at external borders, mandatory asylum procedures and return border procedures;
- The relationship between the legal fiction of non-entry and detention is not made clear in the pact. Pre-entry procedures may involve the excessive use of detention;
- In times of crisis, pre-entry procedures may last for extended periods of time (a total of 290 days) and affect persons who have a high likelihood of being refugees or qualifying for subsidiary protection;
- Limitations to the right to remain during appeal procedures in a border procedure may affect the majority of applicants in times of crisis, seeing that in such cases, the border procedure may be applied to applicants coming from countries with a recognition rate of 75 % or less;
- Children are not excluded from border procedures, despite concerns over their suitability. Only unaccompanied minors and families with children under the age of 12;
- Member States themselves are to ensure monitoring of fundamental rights compliance during the screening;
- The RAMM reinforces the responsibility of the first countries of entry as a consequence of the amendments on the rules on cessation of responsibility and shift of responsibility between Member States;
- The widening of the notion of 'family members' and the increased flexibility in the rules on evidence necessary for establishing responsibility are intended to facilitate family reunification;
- The RAMM proposes the establishment of a corrective mechanism to the functioning of the ordinary rules on the attribution of responsibility. In this way, solidarity is to be a structural component of the CEAS, which is in contrast to current EU law;
- Mandatory solidarity is only activated for search and rescue (SAR) cases, in cases of 'migratory pressures' or a 'situation of crisis'. Even in these cases, however, there are no assurances that a significant number of asylum seekers will be relocated. Member States may avoid relocation by choosing to offer solidarity in different ways;
- When a Member State offers solidarity in the form of return sponsorship, it is not entirely clear what happens after the relocation of the person concerned. In particular, it is unclear if the Member State where the person is relocated shall issue a new return decision or if, in case of detention, the maximum length set by the Return Directive may be cumulated;
- While the principle of integrated policy-making entails an enhanced monitoring and operational support offered to Member States by EU agencies, the new pact package does not alter in any significant way the legal mandate of EU agencies.

### 5.1. Introduction

This chapter discusses the main changes introduced by the pact. The pact has four main building blocks: it introduces new **pre-entry procedures** at external borders and new **mechanisms for responsibility sharing and solidarity**. In addition, it introduces a special **mechanism for crisis and force majeure** and some novel elements to the **governance mechanism** in the area of asylum and immigration. In this chapter, we will first discuss the most significant changes that the pact introduces as regards **pre-entry procedures**, including in times of crisis (Section 5.2.4). Next, we will address proposed changes to mechanisms for **responsibility sharing and solidarity**, including

their application in times of crisis (Section 5.3). We will then turn to the **temporary protection status** introduced by the **crisis regulation** (Section 5.4.), after which we will deal with **the governance framework**, including the role of agencies (Frontex and EASO) and the **overall coordination between the EU and the national level** (Section 5.5).

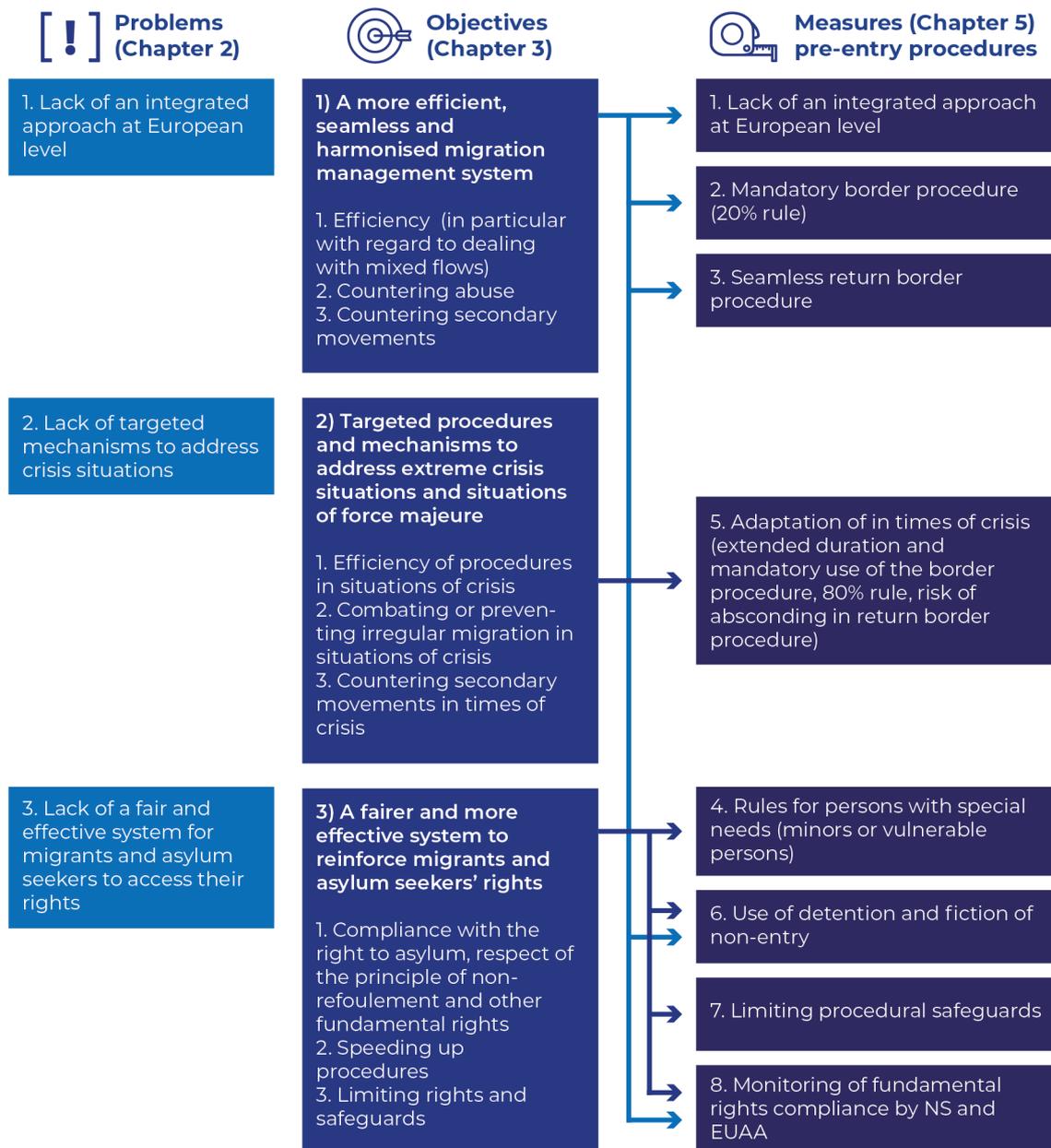
## 5.2. Pre-entry procedures at external borders

The Commission proposes 'new migration management tools' at the external border, which include harmonised procedures to decide swiftly upon arrival. Thus, a 'pre-entry phase' is established, which consists of a screening and a border procedure for asylum and return. These measures are meant to achieve the objective of a **more efficient, seamless and harmonised migration management system**. In particular, they are a response to the problem of '**mixed flows**'.<sup>310</sup> Below, we will first discuss the proposal for the screening regulation. We then turn to the asylum border procedure and the return border procedure after which we address the adaptation of pre-entry procedures in times of crisis. We then discuss rules for persons with special needs and minors, as it has been argued that border procedures are not suitable for these individuals. After this, we address the fiction of non-entry and flesh out its relationship with detention. Next, we look at the way in which the proposals aim to ensure procedural safeguards, or rather limit these in order to bring about more efficiency and swiftness. The last aspect of pre-entry procedures that we discuss is the monitoring mechanism which the Commission proposes during the screening phase.

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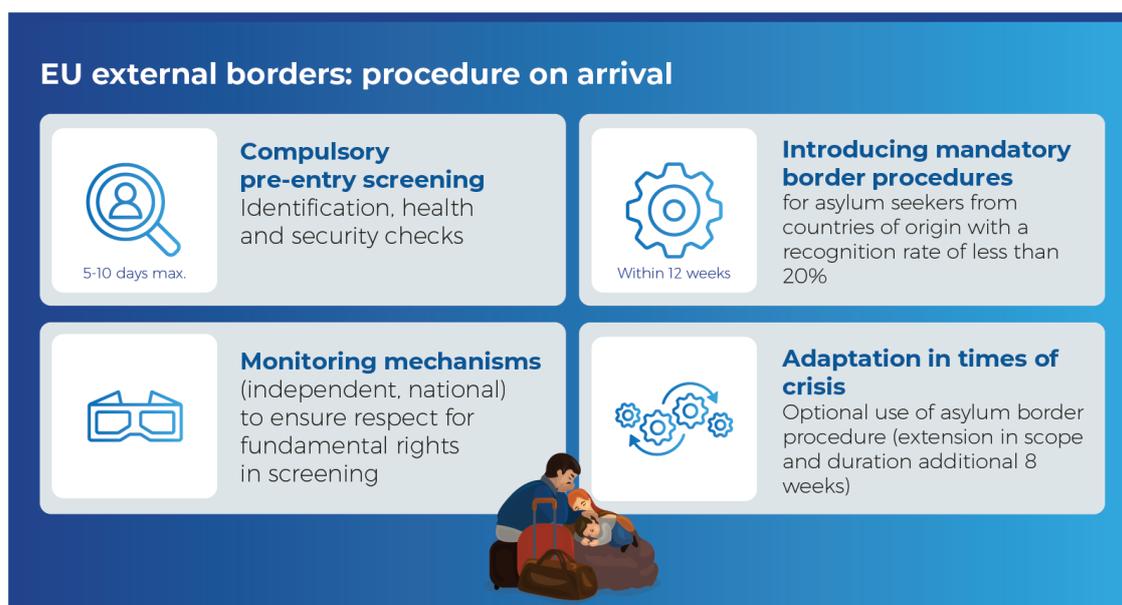
<sup>310</sup> Amended Proposal for APR, COM(2020) 611, Explanatory Memorandum, p. 4, Screening Proposal, COM (2020) 612 final, Recital 4.

Figure 5.2:1 – Objectives and measures for pre-entry stages (problem tree 1)



Source: Ecorys, 2021.

Figure 5.2:2 – Procedure upon arrival



Source: Ecorys, 2021.

### 5.2.1. Screening

The Proposal for a screening regulation stipulates that all TCNs arriving at external borders or disembarked after SAR, who do not satisfy the conditions for entry in the Schengen Borders Code, will be registered and screened to establish their identity and to carry out health and security checks.<sup>311</sup> Such screening is not provided for in current EU law, although Member States are obliged to carry out external border control on the basis of the Schengen Borders Code.<sup>312</sup>

During the screening, persons shall **not be authorised to enter** the territory of the Member State.<sup>313</sup> The screening may take up to **five days**, which may be extended in exceptional circumstances by another **five days**.<sup>314</sup> On the basis of the screening, the TCN will be refused entry and/or referred to the suitable procedure, which can be an asylum procedure, relocation or a return procedure.<sup>315</sup> The Proposal also foresees screening of persons **apprehended on national territory** if there is no indication that the TCN concerned has crossed borders in an authorised manner.<sup>316</sup> After the screening is completed, the Regulation requires Member States to **de-brief** on it.<sup>317</sup> The Commission presents screening as a tool that improves '**management of mixed migration flows**' at external

<sup>311</sup> Screening Proposal, COM (2020) 612 final, Article 1 under a and b. This includes persons applying for international protection, see Article 2.

<sup>312</sup> It has been argued that screening adds very little to the current rules. See Jakulevičienė, L., [Re-decoration of existing practices? Proposed screening procedures at the EU external borders](#), EU migration law blog, 16. July 2021.

<sup>313</sup> Screening Proposal, COM (2020) 612 final, Article 4.

<sup>314</sup> Screening Proposal, COM (2020) 612 final, Article 6(3).

<sup>315</sup> Screening Proposal, COM (2020) 612 final, Article 13.

<sup>316</sup> Screening Proposal, COM (2020) 612 final, Article 5.

<sup>317</sup> Screening Proposal, COM (2020) 612 final, Article 14.

borders by allowing '**for the identification, at the earliest stage possible, of persons who are unlikely to receive protection in the EU.**'<sup>318</sup>

### 5.2.2. Mandatory Asylum Border Procedure

If, after the screening, persons are channelled in the asylum procedure, their asylum applications will be assessed either in a normal (or accelerated) procedure or in an **asylum border procedure**. The new Article 41(6) in the proposal for an amended APR makes explicit that 'applicants subject to the asylum border procedure **shall not be authorised to enter** the MS's territory.'<sup>319</sup>

The most significant change proposed by the pact when compared to the current border procedure is the **mandatory character of the border procedure** for irregular arrivals at the external border or following disembarkation after SAR in three cases. These are: 1) if the applicant poses a risk to national security or public order; 2) if the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents; or 3) if the applicant is from a third country for which the share of positive asylum decisions in the total number of asylum decisions is below 20 per cent.<sup>320</sup> The obligation does not apply if it concerns persons who come from a third country that is considered not to be cooperating sufficiently with regard to return.<sup>321</sup> The Pact does not explain why the border procedure is made mandatory, nor does it explain the rationale for non-entry.

The asylum border procedure should be **as short as possible but take no longer than 12 weeks**. This period includes one appeal.<sup>322</sup> After that period, applicants have a right to enter the territory. The 12-week timeline proposed under the Pact has been criticized by numerous civil society actors and organisations. In a recent report, the Italian government stated that the 12-week deadline for border procedures is unrealistic and subject to underestimation of the management of the burden on the most exposed countries, like Italy.<sup>323</sup> With regard to the location of the border procedure, the Commission writes that 'the border procedure would be more flexible than it currently is, allowing for the holding of applicants not only at the border or in proximity to the border but also at other locations, should capacity become stretched.'<sup>324</sup>

### 5.2.3. Return Border Procedure

If an asylum border procedure is used and the application is rejected, a **return border procedure** will follow.<sup>325</sup> The joint asylum and return border procedure is a **new tool** to prevent 'unauthorised

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<sup>318</sup> Screening Proposal, COM (2020) 612 final, Explanatory Memorandum, p. 1.

<sup>319</sup> Amended Proposal for APR, COM(2020) 611 final, Article 41(6) APR. In this particular respect the proposed border procedure is similar to the current border procedure in Article 43 [Asylum Procedures Directive](#).

<sup>320</sup> Amended Proposal for APR, COM(2020) 611 final, Article 41(3) linking it to Article 40(1) in the 2016 Proposal (COM(2016) 467 final), which provides for cases in which *accelerated* procedures may be used to decide on the merits of an asylum applications.

<sup>321</sup> The finding of non-cooperation of a third-country is a complex procedure which links the provisions on the mandatory border procedure in Article 41 Amended Proposal for APR, COM(2020) 611, with Article 25a in Regulation (EC) No 810/2009 (Amended Visa Code).

<sup>322</sup> In current EU law, the border procedure cannot last more than 4 weeks, See Article 43 APD.

<sup>323</sup> Documentazione per le Commissioni ESAME DI ATTI E DOCUMENTI DELL'UNIONE EUROPEA. [Nuovo patto sulla migrazione e l'asilo](#). Camera dei deputati. 16 March 2021, in Country Research Italy, Ecorys, 2021.

<sup>324</sup> SWD (2020) 207 final, p. 72 and Amended Proposal for APR, COM(2020) 611 final, Explanatory Memorandum, p. 15.

<sup>325</sup> Amended Proposal for APR, COM(2020) 611 final, Article 41a(1) and (2). See also EPRS, [Substitute Impact Assessment of the proposed Recast for the Return Directive](#), 2019, p. 91.

entries and unauthorised movements,<sup>326</sup> in particular 'where a large share of asylum applicants originate from low recognition rate countries.'<sup>327</sup> Persons subject to the return border procedure are **not authorised to enter** the Member State's territory.<sup>328</sup> They should be kept at the external borders, or in their proximity, or in transit zones. However, if capacity becomes stretched, Member States may resort to the use of other locations within their territory.<sup>329</sup> A period for **voluntary return** can be granted, but it may not exceed 15 days.<sup>330</sup> The duration of the return border procedure has a maximum of 12 weeks;<sup>331</sup> a time period that has been criticized by representatives from the Red Cross EU office. More specifically, concerns were raised regarding its potentially detrimental effects on the assurance of migrants' fundamental rights, with interviewed representatives stating that 'enormous focus on accelerating returns is a key risk for right to access protection. We see a risk that procedural rights will be undermined.'<sup>332</sup> Member States may choose not to apply the Return Directive to persons subject to the return border procedure, although certain guarantees of that instrument remain applicable, in particular those relating to coercive measures and *non-refoulement*.<sup>333</sup> The return border procedure aims at increasing 'successful returns directly from the external border within a short period of time after the arrival,' therewith decreasing 'the risk of applicants absconding or performing unauthorised movements.'<sup>334</sup>

#### 5.2.4. Adaptation of pre-entry procedures during crisis or force majeure

As mentioned in the introduction to this chapter, the Pact introduces a **crisis instrument** which 'covers exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State, being of such a scale and nature that it would render a Member State's asylum, reception or return system non-functional and which risk having serious consequences for the functioning of, or result in the impossibility of applying, the Common European Asylum System and the migration management system of the Union.' The crisis instrument would also cover situations where there is a risk of such a situation, and it addresses situations of *force majeure* in the field of asylum and migration management.<sup>335</sup>

With regard to the pre-entry procedures in the Pact, the most significant proposed derogations from the proposed APR concern an **extension of the use of the border procedures** and **extension of their maximum duration**. In **situations of crisis**, Member States may apply the border procedure applicants coming from a country with an EU-wide **recognition rate of 75 % or lower**, in addition to the existing grounds for the border procedure in the proposed APR.<sup>336</sup> This means that the asylum

<sup>326</sup> Amended Proposal for APR, COM(2020) 611 final, Explanatory Memorandum, p. 4.

<sup>327</sup> SWD (2020) 207 final, p. 72. The return border procedure is detailed in the same legislative instrument (Amended Proposal for APR, COM(2020) 611 final) as the asylum border procedure, replacing the return border procedure included in the 2018 Proposal for a recast Return Directive (COM(2018) 634 final). Current EU law does not have a return border procedure.

<sup>328</sup> Amended Proposal for APR, COM(2020) 611 final, Article 41a, para 2.

<sup>329</sup> Amended Proposal for APR, COM(2020) 611 final, Article 41a(2).

<sup>330</sup> Amended Proposal for APR, COM(2020) 611 final, Article 41a (4).

<sup>331</sup> Amended Proposal for APR, COM(2020) 611 final, Article 41a (2).

<sup>332</sup> Migration Pact Impact Assessment interview with Red Cross EU Office, Ecorys, 2021 Ecorys, p. 1-2.

<sup>333</sup> Amended Proposal for APR, COM(2020) 611 final, Article 41a (8). Directive 2008/115 (Return Directive), Article 2(2)(a) provides Member States with the possibility to exclude third-country nationals refused entry or apprehended in connection with the crossing of external borders from the scope of the Return Directive.

<sup>334</sup> Amended Proposal for APR, COM(2020) 611 final, Explanatory Memorandum, p. 9.

<sup>335</sup> Crisis instrument, COM (2020) 619 final, Article 1. See also section 5.3.5.

<sup>336</sup> Crisis instrument, COM (2020) 619 final, Article 4(1) (a).

border procedure in times of crisis would affect people who have a large likelihood of being refugees or persons qualifying for international protection.

Moreover, in situations of crisis, it is possible to **extend the duration** of the asylum border procedure and the return border procedure each by another eight weeks.<sup>337</sup> As a consequence, in times of crisis, the seamless asylum and return border procedure could last for a total period of **40 weeks plus ten days of screening**. The Crisis instrument also proposes derogations from the provision in the APR on registering applications for international protection: Member States are allowed to **delay the registration of applications for international protection** up to **four weeks** (instead of the usual 3 working days in the proposed APR).<sup>338</sup> In practice, this rule could result in a duration of a stay at the external border of an even longer period as indicated above, seeing that the asylum border procedure can only start after registering an application. Derogations to the provisions in the APR aim at to ensure the 'enforcement of procedures in situations of crisis, when specific adjustments are needed to allow the competent authorities under strain to exercise their tasks diligently and cope with significant workload.'<sup>339</sup> Civil society representatives from Italy and Germany have voiced concern over the potential to extend asylum border procedures and return in times of crisis.<sup>340</sup> Focusing on unaccompanied minors put through an extended return procedure, the German NGO, PRO ASYL, has stated that it 'is directly opposed to EU rights, especially in regard to vulnerable groups and children.'<sup>341</sup>

### 5.2.5. Rules for Persons with Special Needs

Screening is also proposed because it is 'important to identify at the earliest stage possible all those in need of immediate care, as well as to identify minors and vulnerable persons.'<sup>342</sup> The Screening Proposal aims to provide 'timely and adequate support' if there are indications of vulnerabilities or special reception or procedural needs. In the case of minors, support shall be given by personnel trained and qualified to deal with minors, in cooperation with child protection authorities.<sup>343</sup> However, there is no reference to persons with special needs or minors in the rules on the **outcome** of the screening or the **debriefing**. When interviewed, representatives from EuroMed Rights express concern for the manner in which the shortened time-line allocated under the new pact for screening may increase the risk of vulnerabilities not being detected and/or assessed sufficiently during the procedure(s) in question.<sup>344</sup>

The proposal for an amended APR **does not exclude persons with special needs from** border procedures. However, it determines that **unaccompanied minors and families with children**

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<sup>337</sup> Crisis instrument, COM (2020) 619 final, Articles 4 and 5.

<sup>338</sup> Crisis instrument, COM (2020) 619 final, Article 6, by derogation from Article 27 of the Asylum Procedures Regulation (COM(2016) 467 final).

<sup>339</sup> Crisis instrument, COM (2020) 619 final, Explanatory Memorandum, p. 3.

<sup>340</sup> EuroMed Rights (2020), [A 'fresh start' for human rights violations](#). Analysis of the New EU Pact on Migration and Asylum; ProAsyl. In Country Research Italy, Ecorys, 2021; [Der New Pact: Neue Grenzverfahren, mehr Haft, keine Lösungen alter Probleme](#). Statement. Frankfurt am Main, 28, October 2020. In Country Research Germany, Ecorys, 2021.

<sup>341</sup> PRO ASYL: 'Der 'New Pact': Neue Grenzverfahren. Mehr Haft, keine Lösung alter Probleme', 28 October 2020.

<sup>342</sup> Screening Proposal, COM (2020) 612 final, Explanatory Memorandum, p. 4.

<sup>343</sup> Screening Proposal, COM (2020) 612 final, Article 9 and Explanatory Memorandum, p. 12.

<sup>344</sup> Migration Pact Impact Assessment interview with EuroMed Rights, Ecorys, 2021. EuroMed Rights Interview, Ecorys, 2021, p. 2.

**under the age of 12 are exempt** from such procedures, unless when they are considered to be a danger to the national security or public order of a Member State.<sup>345</sup>

According to the Explanatory Memorandum to the Crisis instrument, 'the rights of the child are protected in the proposal by excluding minors from the asylum crisis management procedure except in very limited circumstances, namely in cases where they would represent a danger to the national security or public order of the Member State concerned.'<sup>346</sup> However, the actual provisions in that instrument, providing derogations from the asylum and border return procedure and allowing for late registration of applications, do not contain special rules for minors or persons with special needs. It can thus be assumed that in line with the applicable rules in the Proposal for an amended APR, only unaccompanied minors and families with children under the age of 12 are exempt from crisis management asylum and return border procedures.

### 5.2.6. Fiction of Non-Entry and Detention

The pact determines that persons subject to pre-entry procedures (both screening and asylum and return border procedures) are **not authorised to enter** the territory of the Member States.<sup>347</sup> Thus, Member States are 'required to apply measures pursuant to national law to prevent the persons concerned from entering the territory during the screening', which 'in individual cases may include detention.'<sup>348</sup> According to the SWD, 'during the screening, migrants would be **held** by competent national authorities.' At the same time, the Screening proposal 'leaves the determination in which situations the screening requires detention and the modalities thereof [...] to national law.'<sup>349</sup> As we shall set out in Chapter 6, this raises inconsistencies seeing that the Charter is fully applicable to the screening procedure.<sup>350</sup>

Similarly, in the proposals for asylum and return border procedures, the pact does not make clear how the **fiction of non-entry** relates to the **use of detention**. While it is maintained that the asylum border procedure 'can be applied without recourse to detention,' Member States should nevertheless 'be able to apply the grounds for detention during the border procedure in accordance with the Reception Conditions Directive.'<sup>351</sup> Whereas the use of detention during the screening phase is thus left to national law, it is to be regulated by EU law during the border procedure.<sup>352</sup>

As regards the return border procedure, according to the SWD 'irregular migrants in a return border procedure would not be subject to detention as a rule. At the same time, Member States are obliged to '[keep] applicants whose applications have been rejected in border facilities until the enforcement of the return decision.'<sup>353</sup>

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<sup>345</sup> Amended Proposal for APR, COM(2020) 611 final, Explanatory Memorandum, p. 11, Article 41a (5) and Article 40(5) (b).

<sup>346</sup> Crisis instrument, COM (2020) 619 final, Explanatory Memorandum, p. 12.

<sup>347</sup> Screening Proposal, COM (2020) 612 final, Article 3, Articles 41(6) and 41a (1) Amended Proposal for APR, COM(2020) 611 final. Non-entry is a feature of the current border procedure, and the Pact thus proposes to extend it to the new screening and return border procedures.

<sup>348</sup> Screening Proposal, COM (2020) 612 final, Recital 12.

<sup>349</sup> Screening Proposal, COM (2020) 612 final, Explanatory Memorandum, p. 9.

<sup>350</sup> Member States are implementing EU law, see Article 51 Charter.

<sup>351</sup> Amended Proposal for APR, COM(2020) 611 final, Recital 40f.

<sup>352</sup> Article 8(1)(d) of the 2016 Proposal for a recast of the Reception Conditions Directive (COM(2016) 465 final) provides for detention in order to decide in the context of a border procedure on applicants' right to enter the territory.

<sup>353</sup> SWD (2020) 207 final, p. 74. See also Amended Proposal for APR, COM(2020) 611 final, Article 41a (5) and (6).

Non-governmental interviewees expressed concern that the fiction of non-entry in the screening and border procedures would entail the (excessive) **use of detention in practice**.<sup>354</sup> As we will explain in Chapter 6, the complex interplay between the various instruments of the CEAS and the Charter of Fundamental Rights is such, that in practice, the 'holding' of applicants for asylum at the border or in transit zones before entry is granted will amount to detention.<sup>355</sup> In this context, it is significant that in 2013, the Commission was of the opinion that border procedures could 'only [be used] in exceptional circumstances since they **imply detention**.'<sup>356</sup> In the view of the German government, restrictions on liberty and deprivation of liberty should be possible, especially in border procedures, if no alternatives are available. Detention is the last resort and the strict requirements of national law are taken into account here. Furthermore, the German Government is of the opinion that the pact does not provide for blanket detention in asylum border procedures, which would not even be legally possible.<sup>357</sup>

Regarding the **grounds for detention** in a return border procedure, the proposal for an amended Asylum Procedures Regulation distinguishes between two groups: those detained during the asylum border procedure and those who were not. The former 'may continue to be detained for the purpose of preventing entry into the territory of the Member State, preparing the return or carrying out the removal process'; the latter 'may be detained if there is a risk of absconding within the meaning of the Return Directive, if they avoid or hamper the preparation of return or the removal process or they pose a risk to public policy, public security or national security.'<sup>358</sup>

The proposed **crisis instrument** introduces **two additional cases** in which the **existence of a risk of absconding** can be presumed unless proven otherwise, therewith providing increased possibilities for using detention in return procedures. The two additional grounds are (1) explicit expression of the intent of non-compliance with return-related measures, or (2) when the applicant, third-country national or stateless person concerned is manifestly and persistently not fulfilling the obligation to cooperate.<sup>359</sup>

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<sup>354</sup> Migration Pact Impact Assessment interview with Meijers Committee,, Ecorys, 2021; Migration Pact Impact Assessment Country research for Spain on the basis of desk research and an interview with the Comisión Española de Ayuda al Refugiado (CEAR), Ecorys, 2021; Migration Pact Impact Assessment Country research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021; Migration Pact Impact Assessment Country research for Germany on the basis of desk research and interviews with the German Federal Ministry of the Interior, the German Red Cross and the Jesuiten Flüchtlingsdienst Deutschland, Ecorys, 2021. See also; International Commission of Jurists, Detention in the EU Pact proposals, Briefing paper, June 2021.

<sup>355</sup> Cornelisse, G., Borders, Procedures and Rights at Röscke: Reflections on Case C-924/19 (PPU), EDAL database, 9 April 2020; and Cornelisse, G., Territory, Procedures and Rights: Border Procedures in European Asylum Law, Refugee Survey Quarterly (35) 1: pp. 74–90, 2016; Migration Pact Impact Assessment interview with Meijers Committee, Ecorys, 2021; Migration Pact Impact Assessment Country research for Spain on the basis of desk research and an interview with the Comisión Española de Ayuda al Refugiado (CEAR), Ecorys, 2021; Migration Pact Impact Assessment Country research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021; See also International Commission of Jurists, Detention in the EU Pact proposals, Briefing paper, June 2021. We discuss the pertinent case law in more detail in Chapter 6.

<sup>356</sup> COM(2013) 411 final, p. 4.

<sup>357</sup> Migration Pact Impact Assessment Country research for Germany on the basis of desk research and interviews with the German Federal Ministry of the Interior, the German Red Cross and the Jesuiten Flüchtlingsdienst Deutschland, Ecorys, 2021.

<sup>358</sup> Amended Proposal for APR, COM(2020) 611 final, Article 41a (5) and (6).

<sup>359</sup> Crisis instrument, COM (2020) 619 final, Article 5(1) under c.

### 5.2.7. Procedural Safeguards and the Right to Remain

The Pact proposes to issue **return decisions in the same act** as the decision rejecting the asylum application, or – if return decisions are issued as a separate act – that these are issued at the same time and together with the decision rejecting the asylum application.<sup>360</sup> Before it was up to the Member States whether they issued a return decision together with the rejection of an asylum application. This change, which is also relevant in the context of border procedures, is proposed in order to make the **return process quicker**, prevent the **misuse of asylum procedures** and **limit unauthorised movements**.<sup>361</sup> The appeal against a return decision would be brought before the **same court** and with the **same deadlines** as the appeal against the asylum decision, a change which aims to increase **procedural efficiency**.<sup>362</sup>

In addition, in border procedures, only **one level of appeal** would be allowed, and the **suspensive effect** of the appeal would **not be automatic**. Thus, applicants would only enjoy a **right to remain** during their appeal in a border procedure if a court grants such a right upon their request.<sup>363</sup> In the cases that a court has not granted a right to remain, **applicants will not be authorised to enter the territory**, even if the appeal has not been decided after the expiry of the maximum period for the border procedure.<sup>364</sup> In times of crisis, these limitations to the right to remain may thus affect all applicants coming from countries with a recognition rate of 75 % or lower.

### 5.2.8. Monitoring Fundamental Rights Compliance

The screening proposal requires that each Member State establish an **independent monitoring mechanism**, to ensure that **fundamental rights** are observed in relation to the screening and that any allegations of fundamental rights violations are properly investigated.<sup>365</sup> The mechanism should cover the protection of fundamental rights at all times during the screening, as well as conformity with the applicable **national rules on detention**.<sup>366</sup> The Fundamental Rights Agency may provide general guidance with regard to the setting up and functioning of the mechanism, and it may – upon request – support the Member States in developing it. When interviewed, a representative from the Fundamental Rights Agency noted that the agency welcomes the pact's requirement for an independent monitoring mechanism, further noting having national actors carrying out the monitoring allows for adjustments to realities 'on the ground' and can build on national preventive mechanisms. The pact determines that the monitoring mechanism of the EUAA will, in any case, cover the application of the border procedure, for which Member States should also have proper national mechanisms in place.<sup>367</sup> When interviewed, a representative from DG HOME further explained that, as the screening phase is the most delicate phase, it needs to be subject to monitoring in order to ensure that the fundamental rights of asylum seekers and migrants are respected. As a result, there is an obligation for national monitoring mechanism in place on a national level.<sup>368</sup>

<sup>360</sup> Amended Proposal for APR, COM(2020) 611 final, Article 35a.

<sup>361</sup> SWD (2020) 207 final, p. 74, and Amended Proposal for APR, COM(2020) 611 final, Article 35a.

<sup>362</sup> SWD (2020) 207 final, p. 74 and Amended Proposal for APR, COM(2020) 611 final, Article 53.

<sup>363</sup> SWD (2020) 207 final, p. 73, and Amended Proposal for APR, COM(2020) 611 final, Article 54.

<sup>364</sup> Amended Proposal for APR, COM(2020) 611 final, Recital 40e.

<sup>365</sup> SWD (2020) 207 final, p. 88.

<sup>366</sup> Screening Proposal, COM (2020) 612 final, Article 7 and Explanatory Memorandum, p. 11.

<sup>367</sup> SWD (2020) 207 final, p. 86. Monitoring will be dealt with more in depth in Chapter 8 of this report.

<sup>368</sup> Migration Pact Impact Assessment interview with DG Migration and Home Affairs, Ecorys, 2021, Ecorys, 2021, p. 3.

### 5.3. Mechanisms for responsibility sharing and solidarity

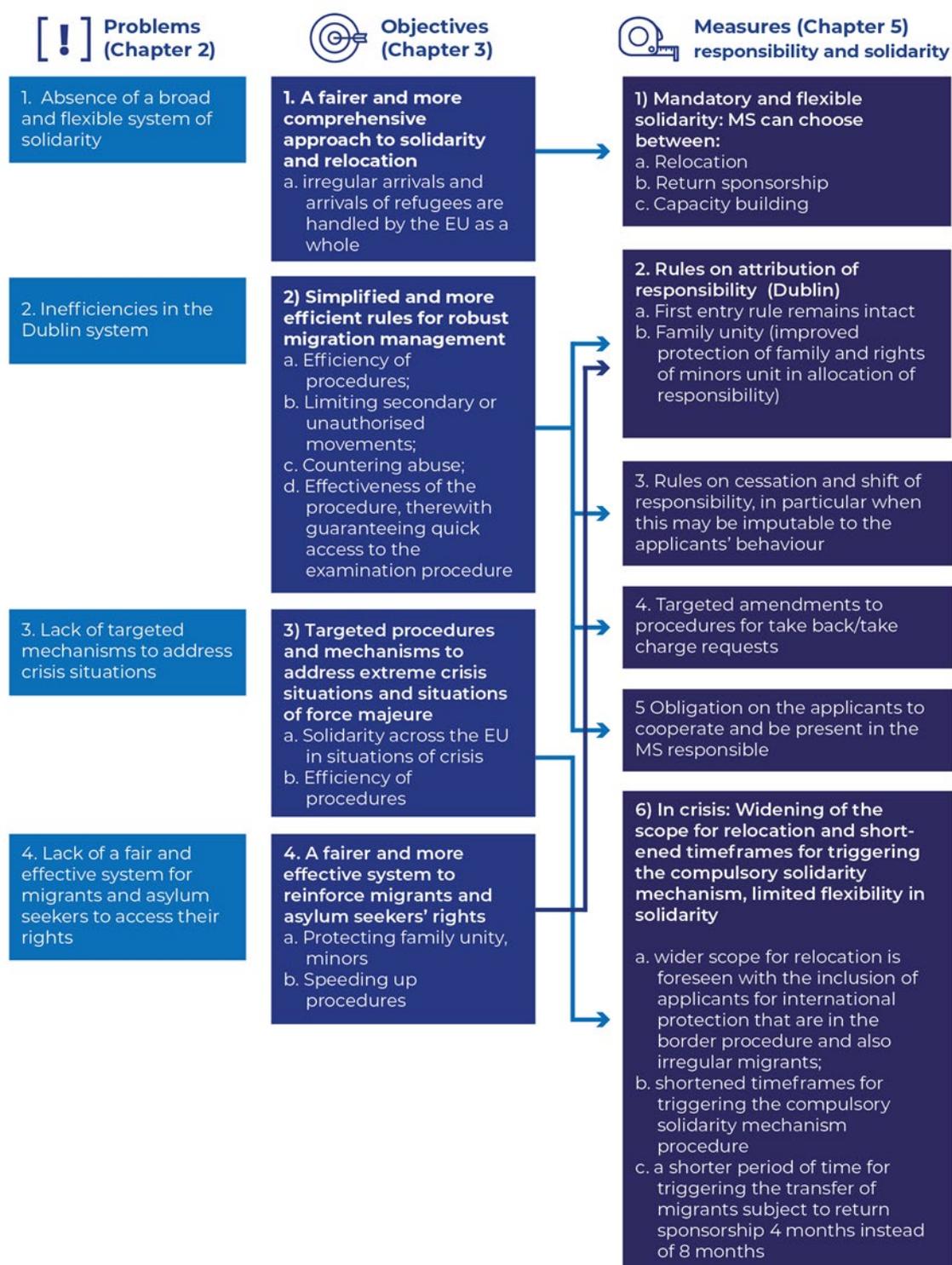
The second building block of the Pact proposes changes to mechanisms for **responsibility sharing and solidarity**, including their application in times of crisis. In particular, the Commission proposes abolishing the Dublin III regulation and withdrawing the 2016 proposal for a recast<sup>369</sup> by introducing simplified and more efficient rules for sustainable sharing of responsibility for asylum applicants across the EU, complemented by a flexible' and 'comprehensive' solidarity mechanism.<sup>370</sup>

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<sup>369</sup> COM(2016)270, so called Dublin IV regulation.

<sup>370</sup> COM(2020)613, p. 1.

Figure 5.3:1 – Objectives and measures for responsibility sharing and solidarity (problem tree 2)



Source: Ecorys, 2021.

### 5.3.1. Responsibility sharing

The pact proposes to put in place '**simplified and more efficient rules for robust migration management**' in order to respond to the problem of inefficiencies in the current Dublin system.<sup>371</sup> Specific measures are targeted amendments to the current rules on attribution of responsibility, on procedures and guarantees, on cessation and shift of responsibility and the establishment of obligations for applicants. These measures are aimed at improving efficiency and effectiveness of procedures, limiting secondary or unauthorised movements and countering abuse.

#### Determining Responsibility

The RAMM essentially preserves the current criteria for determining responsibility.<sup>372</sup> Thus, it introduces only one entirely **new criterion**, relating to the 'possession of a diploma or qualification issued by an education institution established in a Member State.'<sup>373</sup> Most significantly, it retains **the first country of entry criterion** of the current Dublin system, clarifying that it applies also to persons disembarked after **SAR**.<sup>374</sup>

Targeted adjustments of current criteria are proposed in order to reduce incentives for what 'today are considered as unauthorised movements.'<sup>375</sup> Thus, while keeping the existing rule which allocates responsibility on the basis of family ties, the RAMM **extends** the definition of 'family members' to cover also **siblings** and family relations which were formed **after leaving the country of origin** but before arrival on the territory of the Member States.<sup>376</sup> This latter change reflects the need to adjust legislation to 'recent migratory phenomena such as longer stays outside the country of origin before reaching the EU, including in refugee camps where family ties may be established.'<sup>377</sup> Moreover, the **evidential requirements** to demonstrate family ties have been lowered.<sup>378</sup> These changes are 'expected to reduce the risk of unauthorised movements or absconding for persons covered by the extended rules.'<sup>379</sup>

Government representatives from Italy and Sweden, as well as representatives from various civil society organisations, expressed support for the above-noted expansion of the definition for 'family members'. However, representatives from Red Cross EU Office noted that, whilst they do welcome the expansion of family members to include siblings, the threshold for proving such family ties is higher. As a result, it is argued that even if the definition in question is expanded, more information – and thus time – will likely be needed to substantiate such ties. German government representatives raised the concern that the extension of the concept of the family shifts responsibility away from the country of first entry and transfers responsibility to the Member States

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<sup>371</sup> SWD, COM (2020) 207, p. 70.

<sup>372</sup> COM(2020)610, p. 17.

<sup>373</sup> Article 20(1), RAMM, inspired by Article 14a of the Wikström report.

<sup>374</sup> RAMM, Article 21. Another novelty introduced is the obligation for the Member State to perform security checks pursuant to Article 11 of the Screening Regulation (see section 5.2 above) before applying the criteria for determining responsibility. If there are 'reasonable grounds to consider the applicant a danger to national security or public order' of the Member State carrying out the check, that Member State shall become responsible. Article 8 RAMM.

<sup>375</sup> SWD (2020) 207 final, p. 79.

<sup>376</sup> RAMM, Article 2(g). Extension of definition of family member was also proposed in the 2016 reform proposal.

<sup>377</sup> COM(2020)610, p. 24.

<sup>378</sup> Recital 49, RAMM.

<sup>379</sup> RAMM, p. 24.

in which family members live. With high access numbers of secondary migration, especially in recent years, Germany would be particularly affected.<sup>380</sup>

The rule that Member State' normally keep or bring together' **dependent people** and family members who assist them is retained. The provision now also includes families that were formed **after leaving the country of origin** but before arrival on the territory of the Member States. In addition, it introduces '**severe trauma**' as the reason for dependency. In the case of dependent persons, the family relations covered are **reduced to the parent-child** relationship.<sup>381</sup>

As regards **unaccompanied minors**, the RAMM proposes that in cases where no family criterion is applicable, the Member State responsible shall be the one where the application for international protection was first registered unless it is demonstrated that this is not in the best interests of the minor.<sup>382</sup>

### Procedures for take-back notifications, take-charge requests and transfers

The procedural changes that the Commission proposes are to 'alleviate the administrative burden that currently exists due to procedural inefficiencies in the Dublin system.'<sup>383</sup> According to the Commission, they will bring 'simplification and more effectiveness of procedures.' The first change introduced relates to the **scope of take-back procedures**.<sup>384</sup> The RAMM proposes to extend these procedures also to **beneficiaries** for international protection and to persons **resettled** to another Member State.<sup>385</sup> The RAMM brings under the take-back procedure also the applicants who are due to be **relocated** when they make an application to another Member State before relocation.<sup>386</sup>

Under the RAMM, take-back requests become take-back **notifications**, which the receiving Member State may only confirm or object to.<sup>387</sup>

The RAMM also proposes '**shorter time limits** for the different steps of the procedure, in order to speed up the determination procedure to grant swifter access of an applicant to the asylum procedure.' These shorter time limits concern both take-charge<sup>388</sup> and take-back procedures as well as the taking of transfer decisions.

The deadline for submitting take-charge requests is set at **two months** from the registration of the application or one month from a Eurodac or a VIS hit.<sup>389</sup> The deadline for the requested Member

<sup>380</sup> Migration Pact Impact Assessment Country research for Germany on the basis of desk research and interviews with the German Federal Ministry of the Interior, the German Red Cross and the Jesuiten Flüchtlingsdienst Deutschland, Ecorys, 2021.

<sup>381</sup> RAMM, Article 24.

<sup>382</sup> RAMM, Article 15(5). The proposed new text largely reflects that the 2016 recast proposal.

<sup>383</sup> SWD, p. 82.

<sup>384</sup> Take-back procedures concern cases in which a person has previously lodged an asylum application in another Member State before entering the Member State of current stay.

<sup>385</sup> Article 20(1)(b)(c)(d), RAMM. This goes beyond what was envisaged by the Dublin IV proposal, See article 20, Dublin IV proposal.

<sup>386</sup> Article 28(5), RAMM.

<sup>387</sup> Article 31, RAMM. This is similar to what was envisaged in the Dublin IV proposal, See article 26, Dublin IV.

<sup>388</sup> The take-charge procedure covers cases in which the Member State conducting the procedure for determining responsibility is the only one where an application for international protection has been lodged. When it is found that another Member State should be considered responsible following the criteria for attribution of responsibility, a take-charge request is submitted.

<sup>389</sup> Article 29(1), RAMM. In the current article 21 of the Dublin III, the same time limits are set respectively at three and two months, whereas in the Dublin IV proposal time limits of one month and two weeks were envisaged.

State to reply is set at **one month**, or two weeks in case of Eurodac or VIS hit, from the receipt of the request.<sup>390</sup> An 'urgent' take-charge request may be submitted when the application for international protection was registered after the issuing of a refusal of entry or a return decision. In these cases, the requesting Member State may set the period within which a reply is due.<sup>391</sup> The requested Member State shall, however, reply at least within two weeks.<sup>392</sup> Failure to comply with these time limits may trigger a **shift of responsibility** for examining the asylum application to the requested Member State.<sup>393</sup>

Time limits for take-back procedures are also made more stringent. Thus, the Member State where the person is present shall make a take-back notification 'without delay and in any event within **two weeks**.'<sup>394</sup> Failure to comply with the two-week deadline however, does not lead to a shift of responsibility to the notifying Member State.<sup>395</sup> The receiving Member State has one week to demonstrate that its responsibility has ceased.<sup>396</sup> The RAMM retains the rule on the shift of responsibility when the receiving Member State fails to demonstrate that its responsibility has ceased within the established deadline.<sup>397</sup>

**Rules on transfers** do not change significantly. Thus, the time limit for effecting the transfer is set at **six months**, which is the same as under the current rules.<sup>398</sup> After this deadline, responsibility shifts to the notifying Member State. An exception is introduced for the **case that the person absconds**. In that case, 'the transferring Member State shall retain the right to carry out the transfer within the remaining time at a later stage.' Another novelty relates to the **cost of transfers**: the transferring Member State shall cover the cost with the contribution of the **Asylum and Migration Fund**,<sup>399</sup> which according to the rules currently in force, shall be met by the transferring Member State.<sup>400</sup>

Under the current rules, **detention** can be used in order to secure transfer procedures if there is a 'significant risk of absconding.'<sup>401</sup> The RAMM lowers this threshold by removing the word 'significant'.<sup>402</sup> If detention is used, **more stringent deadlines** for take charge requests and take

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<sup>390</sup> Article 30, RAMM. In the current Dublin III regulation, the deadline is set at two months (article 22(1), Dublin III).

<sup>391</sup> Article 29(2), RAMM.

<sup>392</sup> Article 30(7), RAMM. The deadline for replying to urgent take-charge request is currently set at one month (article 22(6), Dublin III).

<sup>393</sup> See Article 29(1) and 30(8), RAMM. This is also the case under the current rules, see Articles 21(1) and 22(7), Dublin III.

<sup>394</sup> Article 31(1), RAMM. A similar time limit was envisaged by article 26(1) of the Dublin IV proposal. The time limit is currently set at two months or three months as per article 23(2) of the Dublin III, depending on whether the take-back request is based on a Eurodac hit or not.

<sup>395</sup> Currently, failure to comply with the deadlines for take-back requests results in a shift of responsibility. See Article 23(3) Dublin III.

<sup>396</sup> Article 31(3), RAMM. The time limit is currently set at one month or two weeks as per article 25(1) of the Dublin III, depending on whether the take-back request is based on a Eurodac hit or not.

<sup>397</sup> Article 31(4), RAMM. Some minor exceptions.

<sup>398</sup> Article 35 RAMM.

<sup>399</sup> Article 36(1), RAMM. The Wikström report proposed that the cost of transfers was to be met by the general budget of the EU). According to the rules currently in force, shall be met by the transferring MS Article 30(1), Dublin III.

<sup>400</sup> Article 30(1), Dublin III.

<sup>401</sup> Article 28, Dublin III.

<sup>402</sup> Article 34(2).

back notifications are introduced. Expiry of these deadlines triggers the obligation to **release** the applicant from detention.<sup>403</sup>

The RAMM provides for the **right to information** and requires that such information should be 'drawn up in a clear and plain language.'<sup>404</sup> It also harmonises suspensive effects of **appeals against transfer** decisions by eliminating the current 'option-based model'<sup>405</sup> which gives Member State the possibility to implement different models of appeals procedures. Under the RAMM, appeals have **no automatic suspensive effect**, but the person may request the suspension of the transfer decision pending the outcome of the appeal.<sup>406</sup> Clearer time limits are also established in order to **speed up** the appeal process, and the scope of appeals is limited to the question of whether a transfer would result in a real risk of inhuman or degrading treatment for the person concerned (Article 4 of the Charter) and, in case of take-charge procedures, if the provisions in the RAMM on protection of unaccompanied minors, family unity and dependent persons have been infringed.<sup>407</sup>

### Cessation and shift of responsibility

The RAMM proposes changes with regard to the rules on cessation or shift of responsibility between Member States, with the explicit objective to **limit unauthorised movements**.<sup>408</sup>

According to the current rules, responsibility of the country of first entry ceases after 12 months.<sup>409</sup> Under the RAMM however, the **country of first entry remains responsible for three years**. Moreover, the RAMM **deletes** the current rule which provides for the **cessation of responsibility** when a person is absent for at least three months.<sup>410</sup> Cessation will only occur in a number of cases which are not attributable to what is seen as undesirable behaviour of the applicant.<sup>411</sup>

As we have seen above, the RAMM **deletes** the current rule establishing a **shift of responsibility** when the time limit for sending a take-back request is not respected.<sup>412</sup> According to the Commission, such shifts 'appear to have encouraged circumventing the rules and obstructing the procedure.'<sup>413</sup> The RAMM retains the rule providing for a shift of responsibility if the transfer is not carried out within the prescribed time limit, but an amendment is proposed for the case that an

<sup>403</sup> Article 34(3) RAMM. In a take back procedure, the deadlines are: two weeks to issue a notification if the person is detained at registration and one week if they are detained later. In take charge procedures, the urgent process must be used, giving the requested state one week to reply.

<sup>404</sup> In this regard, the EU Asylum Agency is also provided with tasks at it 'shall, in close cooperation with the responsible national agencies, draw up common information material.' Article 11(3) RAMM.

<sup>405</sup> Kay Hailbronner, Daniel Thym, 'EU Immigration and Asylum Law. A Commentary', Hart Publishing, 2016, p. 1568.

<sup>406</sup> Article 33(3), RAMM.

<sup>407</sup> Article 33(1) first subparagraph, RAMM.

<sup>408</sup> COM(2020)610, p. 17. The same objective was pursued by the 2016 recast proposal of Dublin III, where all cessation of responsibility clauses had been deleted and shift of responsibility clauses substantially circumscribed.

<sup>409</sup> Article 13, Dublin III.

<sup>410</sup> Dublin III, Article 19. See also Article 28(2) RAMM on continuation of responsibility.

<sup>411</sup> In the following cases: if another Member States issues a residence document or decides to apply the discretionary clause; if transfers are not carried out within the prescribed time limits; or if the person has left the territory in compliance with a return or removal decision, Article 27 RAMM. See also COM(2020)610, p. 5.

<sup>412</sup> Article 31, RAMM. This amendment was also included in the 2016 proposal.

<sup>413</sup> SWD, p. 79.

applicant **absconds**. In that case, the transferring Member State is allowed to '**stop the clock**' and carry out the transfer at a later stage when the person becomes available.<sup>414</sup>

### Obligations for applicants

In order to 'discourage abuses and prevent unauthorised movements',<sup>415</sup> the RAMM includes **obligations for applicants** to apply in the Member State of first entry or legal stay and remain in the responsible Member State.<sup>416</sup> In case of **non-compliance** with these obligations, the applicant shall **not be entitled to reception conditions** in the Reception Conditions Directive, although the RAMM adds that these sanctions 'shall be without prejudice to the need to ensure a standard of living in accordance with Union law, including the Charter of Fundamental Rights of the European Union, and international obligations.'<sup>417</sup>

### 5.3.2. Mandatory and flexible solidarity

The RAMM proposes the establishment of a corrective mechanism to the functioning of the ordinary rules on the attribution of responsibility. In this way, solidarity is to be a **structural component** of the CEAS. This is on contrast to current EU law, where solidarity measures are the result of political decision-making by the Council. Thus, the Council Decisions of 2015 on relocation were adopted as emergency measures under the umbrella of Article 78(3) TFEU and derogated for the first time to the rules on attribution of responsibility set by the Dublin system.<sup>418</sup> The proposed 'fairer and more comprehensive approach to solidarity'<sup>419</sup> aims at ensuring that irregular arrivals and arrivals of refugees are handled by the EU as a whole.<sup>420</sup> Member States will have to contribute to solidarity through a share which is calculated according to a distribution key based on **50 % GDP and 50 % population**.<sup>421</sup>

The new approach to solidarity is described as 'flexible' and 'comprehensive'. This means that the mechanism can be adjusted to the different migratory challenges faced by Member States<sup>422</sup> and that solidarity measures are widened beyond relocation of asylum seekers.<sup>423</sup> Thus, the Commission proposes a number of **solidarity contributions** through which Member States can choose to contribute (relocation, return sponsorship and other measures aimed at strengthening the capacity of Member States or supporting them in the external dimension). It also proposes a number of **solidarity regimes** according to which solidarity contributions can be adjusted according the migratory challenge Member States are faced with.

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<sup>414</sup> RAMM, article 35(2). Currently, Article 29(3) of the Dublin III gives to requesting Member State 18 months to carry out the transfer when the applicant has absconded.

<sup>415</sup> RAMM, p. 5.

<sup>416</sup> RAMM, p. 96.

<sup>417</sup> Article 10 RAMM.

<sup>418</sup> COM(2020)610, p. 5. Under the decisions, an overall of 160,000 Asylum Seekers were to be relocated to another Member State from Greece. See COM(2020)610, p. 5.

<sup>419</sup> SWD, p. 10.

<sup>420</sup> SWD, p. 9.

<sup>421</sup> Article 54, RAMM.

<sup>422</sup> COM(2020)613, p. 1.

<sup>423</sup> COM(2020)610, p. 1. Similar to the proposal in 2016.

Figure 5.3:2 – The solidarity mechanism explained



Source: Ecorys, 2021.

### 5.3.3. Types of solidarity contributions

As mentioned above, the RAMM establishes three forms of solidarity contributions.

#### *Relocation*

Under the RAMM, **relocation** usually includes applicants for international protection that are **not subject to the border procedure** and **beneficiaries** of international protection.<sup>424</sup> The benefitting Member State shall identify and register the person and ensure that they do not present a danger to national security or public order.<sup>425</sup> The Member State has to 'take into account, where applicable, the existence of meaningful links between the person concerned and the Member State of relocation'.<sup>426</sup> The RAMM provides for financial incentives for relocation: a financial contribution of **€10 000** will be given per relocated person, plus a financial contribution of €500 to cover transfer costs. The financial contribution will be €12 000 when the relocated person is an **unaccompanied minor**.

#### *Return sponsorship*

Member States can also offer solidarity by committing themselves to 'support a Member State to return illegally staying third-country nationals by means of **return sponsorship**.'<sup>427</sup> This form of solidarity has been introduced to break through the political impasse that has characterised debates on solidarity in the EU.<sup>428</sup> It has been **criticised**<sup>429</sup> as distorting the idea of solidarity and increasing the risk of prolonged detention, but it has also been **welcomed** by some of the Member States.<sup>430</sup>

The sponsoring Member State offers **support which is aimed at facilitating and successfully concluding return procedures**. This can be done through measures such as providing support for voluntary return and reintegration, conducting policy dialogue with third countries, obtaining travel documents or organising practical arrangements for return operations.<sup>431</sup> Return sponsorship shall not affect the 'obligations and responsibilities' of the benefitting Member State on the basis of the Return Directive.<sup>432</sup> Thus, the latter **remains responsible** for formal decision-making such as issuing return decisions and deciding on appeals, and also for the actual carrying out of return procedures. If the person has not been returned or removed from the benefitting Member State within 8 months, they are to be transferred to the sponsoring Member State.<sup>433</sup>

The way in which return sponsorship would function **in practice** is not entirely clear. The relationship with the sponsoring Member State is not formalised. Nor does the RAMM (or any other legal instrument) indicate what happens **after transfer**. Will a new return decision have to be issued? How do measures of detention before and after transfer relate to the maximum length set

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<sup>424</sup> Article 45(1), RAMM.

<sup>425</sup> Article 57(2), RAMM. As under the Council Decisions of 2015, the Member State of relocation may object to the transfer when 'there are reasonable grounds to consider the person concerned a danger to its national security or public order', informing the benefitting Member States of the nature of and underlying elements for an alert from any relevant database (see Article 57(7), RAMM).

<sup>426</sup> Article 57(3) RAMM.

<sup>427</sup> Article 55(1), RAMM.

<sup>428</sup> Sundberg Diez, O. and F. Trauner, [EU Return Sponsorships: High Stakes, Low Gains](#), European Policy Centre, 2021.

<sup>429</sup> ECRE, Comments on COM(2020)610, p. 70.

<sup>430</sup> COM(2020)610, p. 15.

<sup>431</sup> Article 55(4), RAMM.

<sup>432</sup> Article 55(4), RAMM.

<sup>433</sup> Article 55(2), RAMM. Similar procedures as in the case of relocation.

by the Return Directive?<sup>434</sup> This question is particularly relevant, seeing that even the current rules do not adequately regulate repeated instances of detention for non-removable migrants. The RAMM also provides for the possibility that Member States commit to provide return sponsorship 'in relation to third-country nationals **who are not yet subject to a return decision** in the benefitting Member State,<sup>435</sup> but does not explain how that would work in practice.

#### *Capacity-building and operational support*

Solidarity contributions can also be offered in the form of '**capacity-building measures in the field of asylum, reception and return**.'<sup>436</sup> The benefitting Member State may receive assistance with putting in place enhanced reception capacity, including infrastructure or other systems to enhance the reception conditions of asylum seekers, or receive other assistance focussed on infrastructure and facilities that may be necessary to improve the enforcement of returns. It has been observed that no procedure is envisaged for establishing what counts as appropriate support in the field of capacity building and ensuring that the contribution offered corresponds to actual needs in the benefitting Member State.<sup>437</sup>

Finally, the RAMM introduces the possibility for Member States to contribute by providing 'operational support and measures aimed at responding to migratory trends affecting the benefitting Member State through cooperation with third countries.'<sup>438</sup> By establishing an **external dimension of solidarity**, the Pact aims to enhance mutual support in the field of cooperation with third countries that are generating 'particular migratory flows to a Member State.'<sup>439</sup>

### 5.3.4. Types of solidarity regimes

Solidarity contributions can be adapted depending on the circumstances, i.e. the **migratory challenges** Member States are confronted with (see Figure 5.3:3). The RAMM establishes three different solidarity regimes, which we discuss here. The proposed Crisis instrument envisages another solidarity regime, establishing also derogations to ordinary timeframes for situations of *force majeure*, which will be discussed in section 5.3.5 below.

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<sup>434</sup> Francesco Maiani, 'A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact', EU Migration Law Blog, 20 October 2020; Meijers Committee, '[CM2012 Meijers Committee Comments on the Migration Pact – The Asylum and Migration Management Regulation](#)', 2020, p. 2; ECRE, Comments on COM(2020)610, p. 54. See for more on this Chapter 7, with regard to coherence of solidarity and responsibility sharing. According to a DG HOME representative under the new pact the rules that govern if a third-country national can be detained, do not change. In addition, the fact that another Member State comes to help with return sponsorship does not change the grounds and limits for detention. Migration Pact Impact Assessment interview with DG Migration and Home Affairs, Ecorys, 2021, p. Interview DG HOME, Ecorys, 2021, p. 2.

<sup>435</sup> See discussion on voluntary solidarity above and solidarity in crisis below.

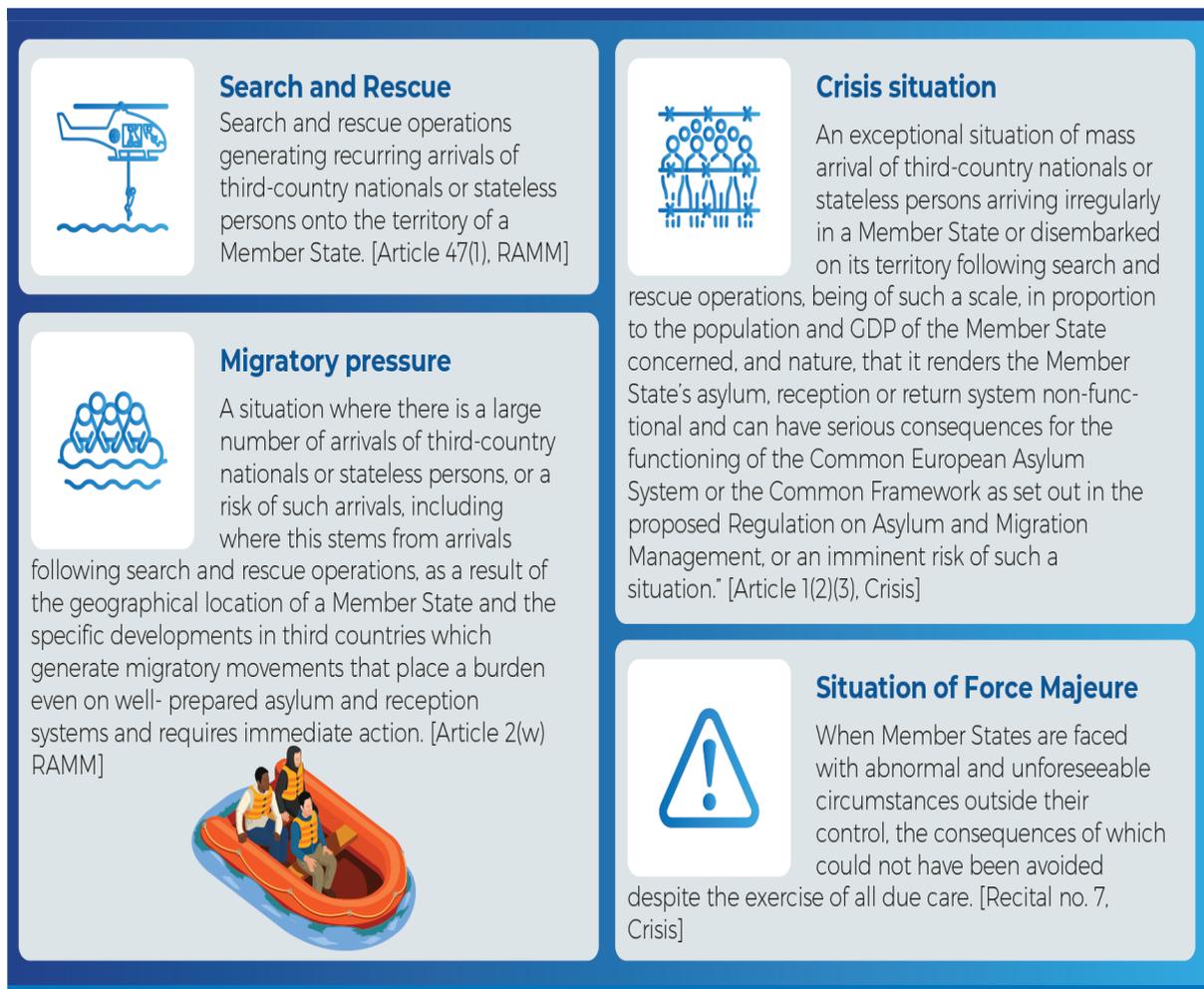
<sup>436</sup> Article 45(1)(d), RAMM.

<sup>437</sup> ECRE, Comments on COM(2020)610, p. 53.

<sup>438</sup> Article 45(1)(d), RAMM.

<sup>439</sup> COM(2020)610, p. 20.

Figure 5.3:3 – Different migratory challenges



Source: Ecorys, 2021.

### Voluntary solidarity

According to RAMM, any Member State may at any time offer solidarity contributions 'in response to a request for solidarity support by a Member State, or on its own initiative'<sup>440</sup> When it concerns **voluntary solidarity**, relocation may be extended to cover applicants for international protection subject to the **border procedure** and **irregular migrants**.<sup>441</sup>

### Search and Rescue (SAR) cases

A specific solidarity mechanism is envisaged for **SAR cases**,<sup>442</sup> which recognises 'the specificities of search and rescue in the EU legal framework for migration and asylum.'<sup>443</sup> This mechanism should

<sup>440</sup> Article 56(2), RAMM.

<sup>441</sup> Article 45(2), RAMM. In cases an irregularly staying TCNs is subject to relocation, the proposal does not clarify whether the person would already have received a return decision in the benefitting state. If so, this mechanism would resemble the return sponsorship mechanism after the lapse of the eight-month period (ECRE, Comments on COM(2020)610, p. 54).

<sup>442</sup> Articles 47-49 RAMM.

<sup>443</sup> COM(2020)609, p. 13.

replace the ad-hoc solidarity initiatives following SAR disembarkations of the past years. It applies to SAR cases that generate 'recurring arrivals [...] onto the territory of a Member State.'<sup>444</sup>

The procedure for activating solidarity responses in SAR cases is complex. At least eight different stages can be identified, starting with **assessment by the Commission** of expected disembarkations to be included in the **Migration Management Report** (see Section 5.5.1 below), coupled with indications of required solidarity measures and specification of the total number of third-country nationals covered by the solidarity measures.<sup>445</sup>

Member States react with **SAR Solidarity Response Plans**. There, they set out the contributions they intend to make.<sup>446</sup> If the combined contributions do not meet the total solidarity contributions set out in the Migration Management Report, a **Solidarity Forum** is convened. There, Member States are invited to adjust their contributions.<sup>447</sup> If the total of contributions then 'corresponds' or is 'sufficiently close' to those set out in the Migration Management Report, the Commission adopts an **implementing act**, establishing a **solidarity pool** for each Member State that expects to face disembarkations.<sup>448</sup> If these contributions still fall 'significantly short' of the total solidarity contributions required, solidarity becomes **mandatory**. The solidarity pool is then also set out in an implementing act by the Commission, in which **relocation distributions** are determined according to the **distribution key**, and support in the form of capacity building is based on what Member States have previously indicated in the process.<sup>449</sup>

The Commission implementing acts can be **amended** in case of **increasing numbers of disembarkations**.<sup>450</sup> Throughout the year, as disembarkations take place, the Commission will use the solidarity pool and, in cooperation with EU agencies, draw up the list of eligible persons to be relocated or to be subject to return sponsorship.<sup>451</sup>

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<sup>444</sup> Article 47(1), RAMM.

<sup>445</sup> Article 47(2), RAMM.

<sup>446</sup> Article 47(4), RAMM.

<sup>447</sup> Article 47(5), RAMM.

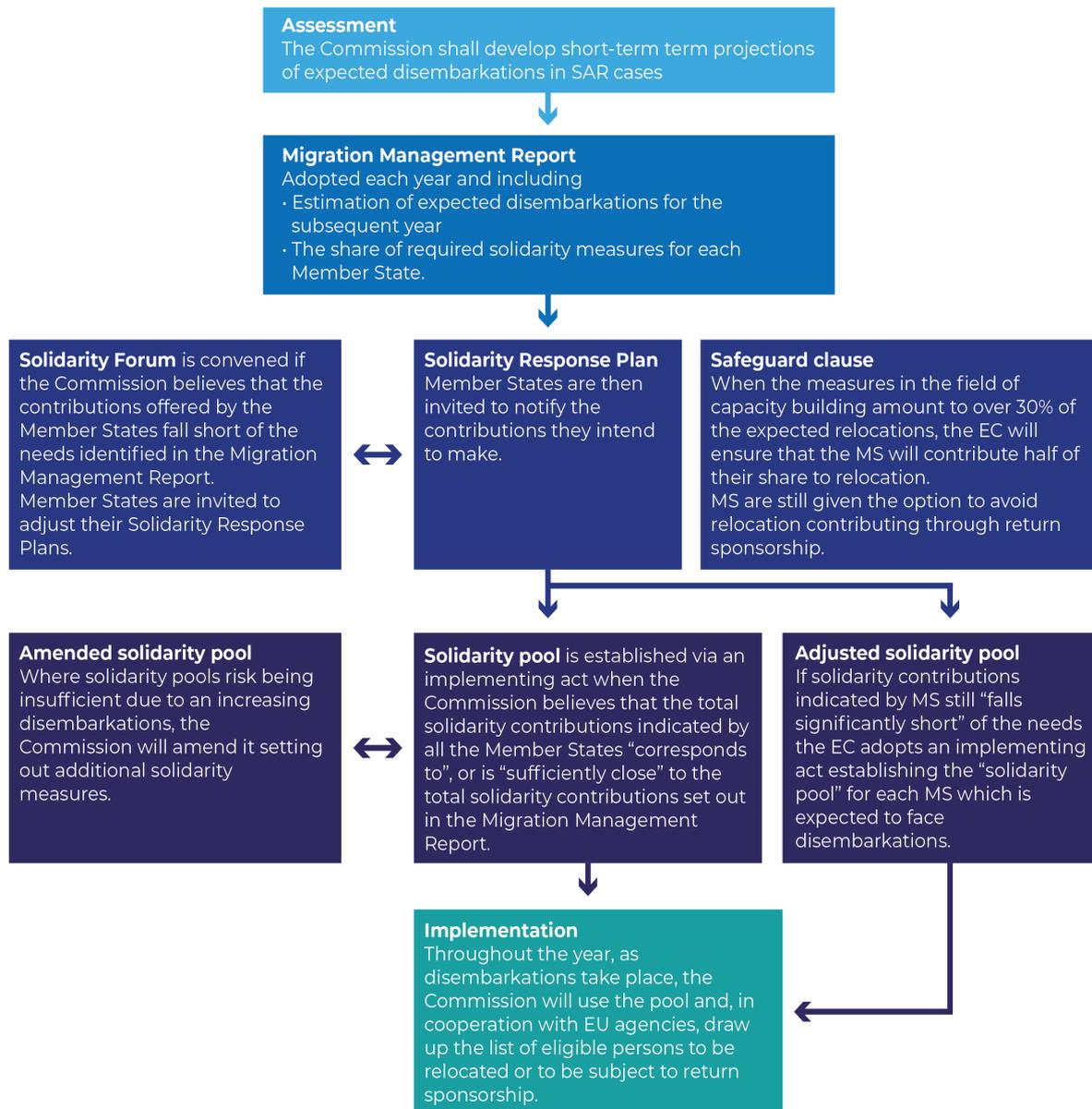
<sup>448</sup> Article 48(1), RAMM.

<sup>449</sup> Calculations and contributions are extremely complicated and technical. A precise explanation goes beyond the scope of this report (see Article 48(2) RAMM).

<sup>450</sup> Article 48(2), RAMM.

<sup>451</sup> Article 49(2), RAMM.

Figure 5.3:4 – Procedure for activating solidarity in SAR cases



Source: Ecorys, 2021.

#### *Situations of migratory pressure*

The RAMM establishes a specific mechanism for offering solidarity in cases defined as of 'migratory pressure'.<sup>452</sup> The procedure envisaged for dealing with situations of migratory pressure is no less complicated than the procedure envisaged for SAR cases. At least six different stages can be identified, starting with the **assessment by the Commission** if a Member State is to be considered

<sup>452</sup> As per Article 2(w) RAMM, a situation of migratory pressure is 'a situation where there is a large number of arrivals of third-country nationals or stateless persons, or a risk of such arrivals, including where this stems from arrivals following search and rescue operations, as a result of the geographical location of a Member State and the specific developments in third countries which generate migratory movements that place a burden even on well-prepared asylum and reception systems and requires immediate action.'

under migratory pressure<sup>453</sup> to be included in the **Report on Migratory Pressure** (see Section 5.5.1 below), along with the indication of the appropriate solidarity measures needed to address the situation.<sup>454</sup>

Member States react with a **Migratory Pressure Solidarity Response Plan**, indicating the type of contributions they intend to make, either in the form of relocation of both applicants and beneficiary of international protection or return sponsorship.<sup>455</sup> If the combined contributions do not correspond to the solidarity needs identified by the Report on migratory pressure, a **Solidarity Forum** is convened. There, Member States are invited to adjust their contributions.<sup>456</sup> Within two weeks from the submission of the Solidarity Response Plans, or the end of the Solidarity Forum, the Commission will adopt an **implementing act** setting out the solidarity measures to be taken by Member States.<sup>457</sup> If the contribution in the field of capacity building are not proportionate to the contribution that a given Member State would have made by means of relocation and return sponsorship,<sup>458</sup> or the measures proposed will lead to a short fall of more than 30 % of the required number of persons to be relocated or subject to return sponsorship,<sup>459</sup> the Commission has the power to **adjust** Member States' contribution accordingly.

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<sup>453</sup> Article 50(1), RAMM. The mechanism is triggered when a Member State 'considers itself, or the Commission 'on the basis of available information, considers' that a Member State is under migratory pressure (Article 50(1), RAMM).

<sup>454</sup> Article 51(3), RAMM. Interestingly, the report may also indicate 'measures that the Member State under migratory pressure should take in the field of migration management, and in particular in the field of asylum and return' (Article 51(3)(b)(i), RAMM).

<sup>455</sup> Article 52(1) RAMM. In case Member States contribute through return sponsorship, they shall indicate the nationalities of the TCNs whose return they intend to sponsor (Article 52(3) RAMM). Apparently, this provision only applies to return sponsorship offered in situations of migratory pressure. Capacity building or support in the area of external dimension is only available in these cases if the Commission has indicated them among the needed measures in the Report on migratory pressure (Article 52(2) RAMM). When or more Member States have not submitted their Solidarity Response Plan, it is for the Commission to determine the types of contributions to be made (Article 52(3) RAMM).

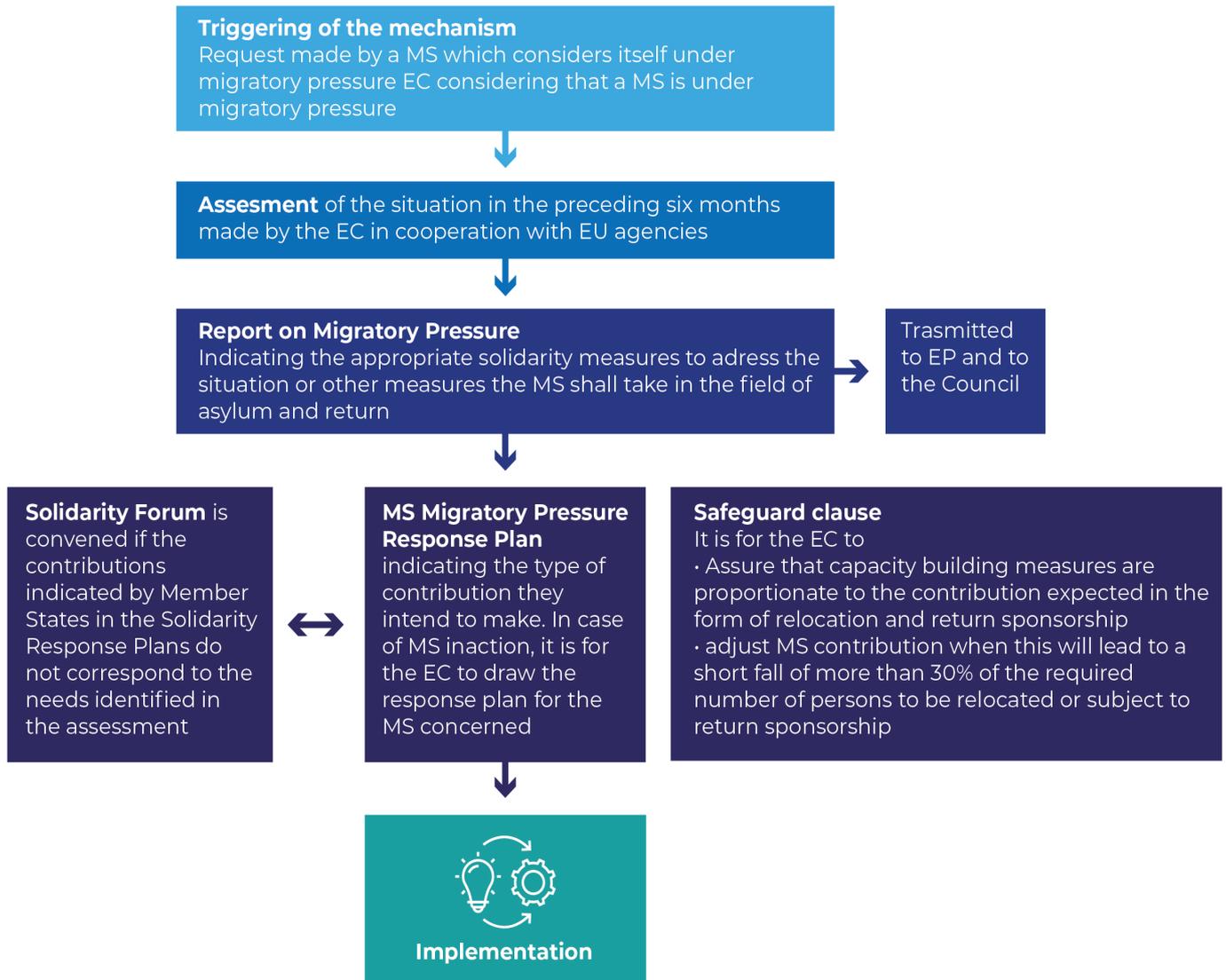
<sup>456</sup> Article 52(4) RAMM.

<sup>457</sup> In particular, the implementing act shall set out the total number of persons to be relocated and/or to be subject to return sponsorship and specify the measures in the field of capacity building, operational support, or measures in the external dimension to be taken by a contributing Member State instead of relocation or return sponsorship (article 53(3) RAMM).

<sup>458</sup> Article, 53(2), third subparagraph, RAMM.

<sup>459</sup> Article 52(2), last period, and article 53(2), fourth subparagraph, RAMM.

Figure 5.3:5 – Procedure for activating solidarity in situations of migratory pressure



Source: Ecorys, 2021.

### 5.3.5. Solidarity in crisis

To ensure that the solidarity mechanism established under the RAMM may be adapted for situations defined as of crisis,<sup>460</sup> a specific solidarity regime is envisaged by the crisis and force majeure regulation. In the Commission's words, the aim is to establish **targeted solidarity procedures and mechanisms** to provide a quick response in circumstances demanding urgency.<sup>461</sup>

<sup>460</sup> According to the Crisis and Force Majeure Regulation, a situation of crisis shall be considered as 'an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State's asylum, reception or return system non-functional and can have serious consequences for the functioning the functioning of the Common European Asylum System or the Common Framework as set out in the proposed Regulation on Asylum and Migration Management, or an imminent risk of such a situation' (Article 1(2)(3), Crisis).

<sup>461</sup> COM(2020)609, p. 10.

The crisis solidarity mechanism is triggered by an implementing act adopted by the Commission following a 'reasoned request' by a Member State. The implementing act shall be adopted if the Commission, following the assessment of the situation in the previous month, determine that a Member State is confronted with a crisis situation. Notably, **shortened timeframes** are set for triggering the compulsory solidarity mechanism and presenting the Response plans.

In crisis situations, a solidarity may only be offered through relocation and return sponsorships. The **scope of compulsory relocation is widened**, with the inclusion of applicants for international protection that are in the border procedure, of irregular migrants and of persons granted immediate protection.<sup>462</sup> In cases of solidarity offered through return sponsorship, **the period triggering the transfer of returnees to the sponsoring Member State is shortened to 4 months**.

Finally, when a Member State faces a **situation of force majeure**,<sup>463</sup> timeframes for implementing relocation or undertake return sponsorship may be suspended for a maximum period of six months.<sup>464</sup> It is for the Member State concerned to notify the Commission of that situation and indicate precise reasons for the application of the derogation.<sup>465</sup>

## 5.4. Immediate protection

The Crisis instrument repeals the Temporary Protection Directive<sup>466</sup> and aims to establish a **faster procedure to grant immediate protection** to groups of third-country nationals who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are unable to return to their country of origin.<sup>467</sup>

The Temporary Protection Directive was adopted and entered into force in 2001 following the refugee crisis in Kosovo.<sup>468</sup> Also, in light of the difficulties in reaching Member States' agreement,<sup>469</sup> the Commission has never proposed its activation.<sup>470</sup>

Immediate protection will be **triggered by the Commission** in situations Article 1(2)(a) of the Proposal defines 'a situation of crisis'<sup>471</sup> via the adoption of an implementing act where the specific group of people concerned is determined, and the duration of the immediate protection status is established.<sup>472</sup>

In comparison with temporary protection, the **scope of immediate protection** is reduced. Under the crisis and force majeure regulation, immediate protection will be granted only to 'displaced

<sup>462</sup> On immediate protection, see section 5.4 below.

<sup>463</sup> A situation of force majeure is considered as existing when Member States are faced 'with abnormal and unforeseeable circumstances outside their control, the consequences of which could not have been avoided in spite of the exercise of all due care' (Recital no. 7, Crisis).

<sup>464</sup> Article 9, Crisis.

<sup>465</sup> Recital no. 30, and article 9(1), Crisis.

<sup>466</sup> 2001/55/EC.

<sup>467</sup> COM(2020)609, p. 11.

<sup>468</sup> On the origin of the Temporary Protection Directive, see Kay Hailbronner, Daniel Thym, 'EU Immigration and Asylum Law. A Commentary', Hart Publishing, 2016, 1059-1060.

<sup>469</sup> European Commission (2016) Study on the Temporary Protection Directive. Final report.

<sup>470</sup> Ineli-Ciger, M. (2016). Time to Activate the Temporary Protection Directive, *European Journal of Migration and Law*, 18(1), pp. 1-33.

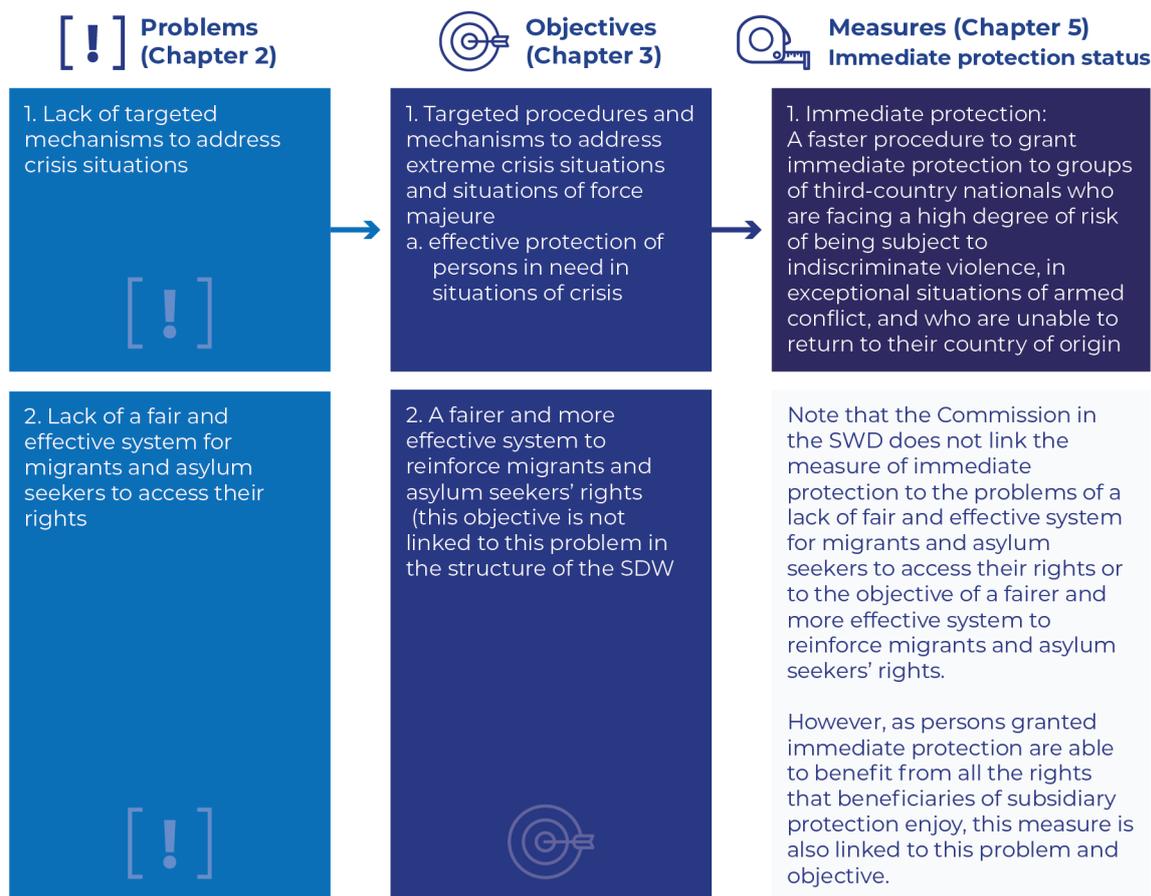
<sup>471</sup> See above, section 5.3.5.

<sup>472</sup> Article 10(4), Crisis and Force Majeure Regulation.

persons from third countries who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are unable to return to their country of origin<sup>473</sup>.

During the period established by the implementing act, the asylum procedure is suspended.<sup>474</sup> This means that the processing of international protection applications of persons granted immediate protection is postponed for a certain period of time. During this period, persons granted immediate protection will **benefit from equivalent economic and social rights that subsidiary protection beneficiaries**. Notably, these rights will include the right to family unity, freedom of movement within the Member State, access to employment, access to education, social security and assistance, healthcare and access to integration measures.<sup>475</sup>

Figure 5.4.1 – Immediate protection (problem tree 3)



<sup>473</sup> Article 10(1), Crisis and Force Majeure Regulation. Temporary protection could be granted to persons qualifying for refugee status who have left areas of armed conflict or of endemic violence or have been or at serious risk to become victims of generalized violations of their human rights (Article 2(c), 2001/55/EC).

<sup>474</sup> Article 10(3), Crisis and Force Majeure Regulation.

<sup>475</sup> COM(2020)613, p. 10.

## 5.5. Governance framework

Part II of the RAMM sets out a **common framework for the management of asylum and migration in the Union**.<sup>476</sup> In particular, it is established that both the EU and Member States, acting within their respective competencies,<sup>477</sup> 'shall take actions in the field of asylum and migration management on the basis of a comprehensive approach'.<sup>478</sup>

These actions shall be 'integrated', meaning that both the EU and Member State must ensure 'coherence' between the different components of the asylum and migration management policy,<sup>479</sup> and shall also be inspired by the 'principle of solidarity and fair sharing of responsibility'.<sup>480</sup>

In the RAMM it is also affirmed that a 'comprehensive approach to asylum and migration management' entails 'full deployment and use' of the operational support that can be offered by EU agencies.<sup>481</sup>

This is reflected in the mentioned principle of '**integrated policy-making**' enshrined by Article 4 of the RAMM, where it is stated that 'Member States, with the support of Union Agencies, shall ensure that they have the capacity to effectively implement asylum and migration management policies'.<sup>482</sup>

In what follows we shall discuss what the principle of integrated policy-making entails for the coordination of actions undertaken by the EU and Member States in the management of asylum and migration (section 5.5.1) and the role envisaged for EU agencies (section 5.5.2).

### 5.5.1. Governance and coordination between national and European level

The idea of a **comprehensive approach** on asylum and migration management is referred to three distinct dimensions relating to the 'where', 'what' and 'how' of EU and Member States actions in the field (see Figure 5.5:1).

For what concerns the first dimension (where), Article 3 (1) RAMM suggests that the geographical scope of asylum and migration management policies extends far beyond the EU borders, covering 'the entirety of the migratory routes'.<sup>483</sup>

For what concerns the second dimension (what), the comprehensive approach to asylum and migration management shall cover the following components: external dimension of migration and asylum, common visa policy, management and prevention of irregular migration, integrated border management; search and rescue at sea, access to asylum procedures and responsibility determination, asylum reception, return policy, integration policies, tackling of illegal employment.<sup>484</sup>

For what concerns the third dimension (how), asylum and migration management policies shall be implemented by developing a 'mutually-beneficial partnerships and close cooperation with

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<sup>476</sup> Article 1(a), RAMM.

<sup>477</sup> Article 4(2), RAMM.

<sup>478</sup> Article 3(1) RAMM.

<sup>479</sup> Article 4(1), RAMM.

<sup>480</sup> Article 5, RAMM.

<sup>481</sup> Article 3(m), RAMM.

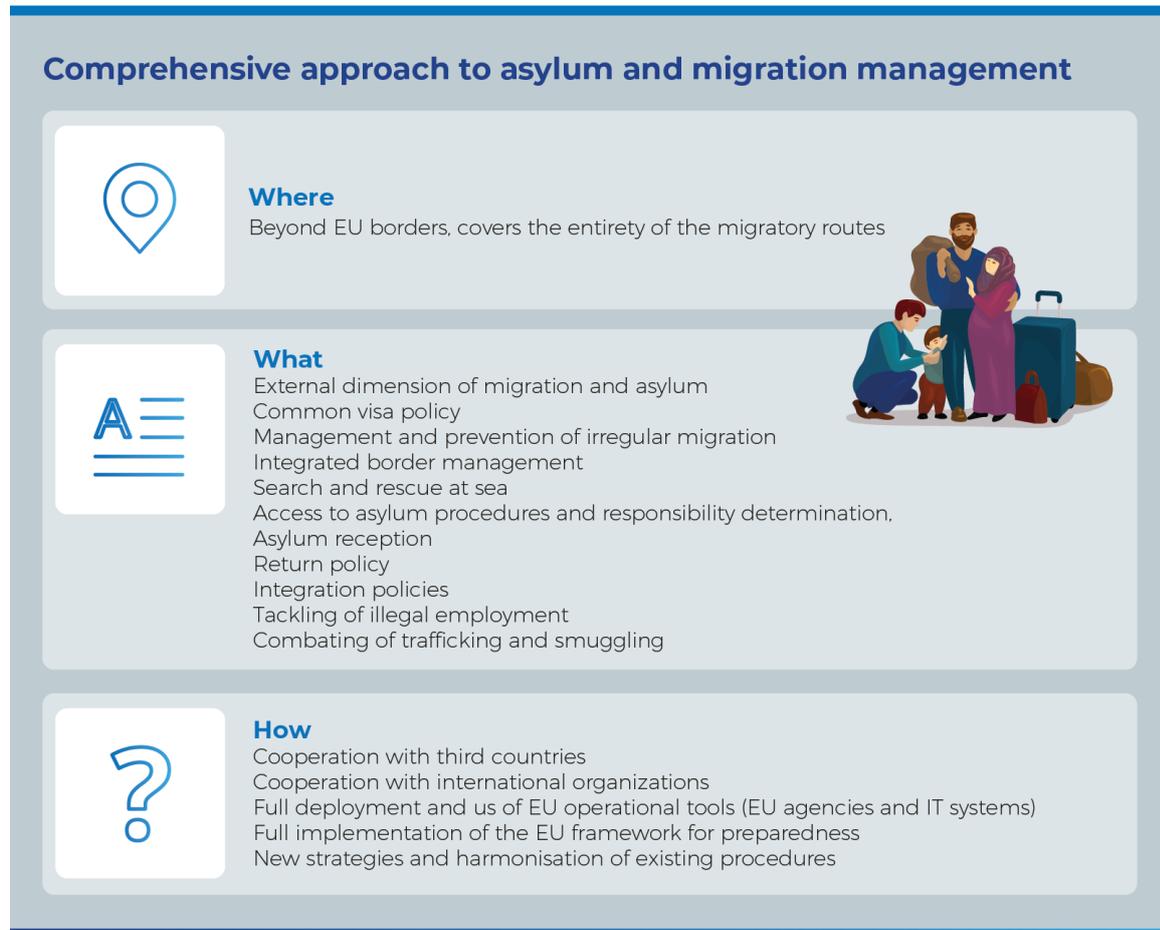
<sup>482</sup> Article 4(3), RAMM.

<sup>483</sup> Article 3(1) RAMM.

<sup>484</sup> Article 3(a) to (l), RAMM.

relevant third countries',<sup>485</sup> as well as working in 'close cooperation and mutual partnership' with relevant international organisations.<sup>486</sup> Moreover, all the existing operational tools at the EU level (notably, EU agencies and IT systems) shall be fully deployed and used,<sup>487</sup> and the new European framework for preparedness and management of crisis fully implemented.<sup>488</sup>

Figure 5.5:1 – Comprehensive approach to migration and management



Source: Ecorys, 2021.

The RAMM establishes a new governance mechanism whereby the Commission is called to adopt a **European asylum and migration management strategy** setting out the strategic approach to managing asylum and migration at Union level.<sup>489</sup> The strategy shall be transmitted to the European Parliament and the Council.<sup>490</sup>

In developing the strategy, the Commission shall 'take into account'<sup>491</sup> the following sources:

<sup>485</sup> Article 3(a) RAMM.

<sup>486</sup> Article 3(b) RAMM.

<sup>487</sup> Article 3(m), RAMM.

<sup>488</sup> Article 3(n), RAMM.

<sup>489</sup> Article 6(1) RAMM.

<sup>490</sup> Article 6(1), RAMM.

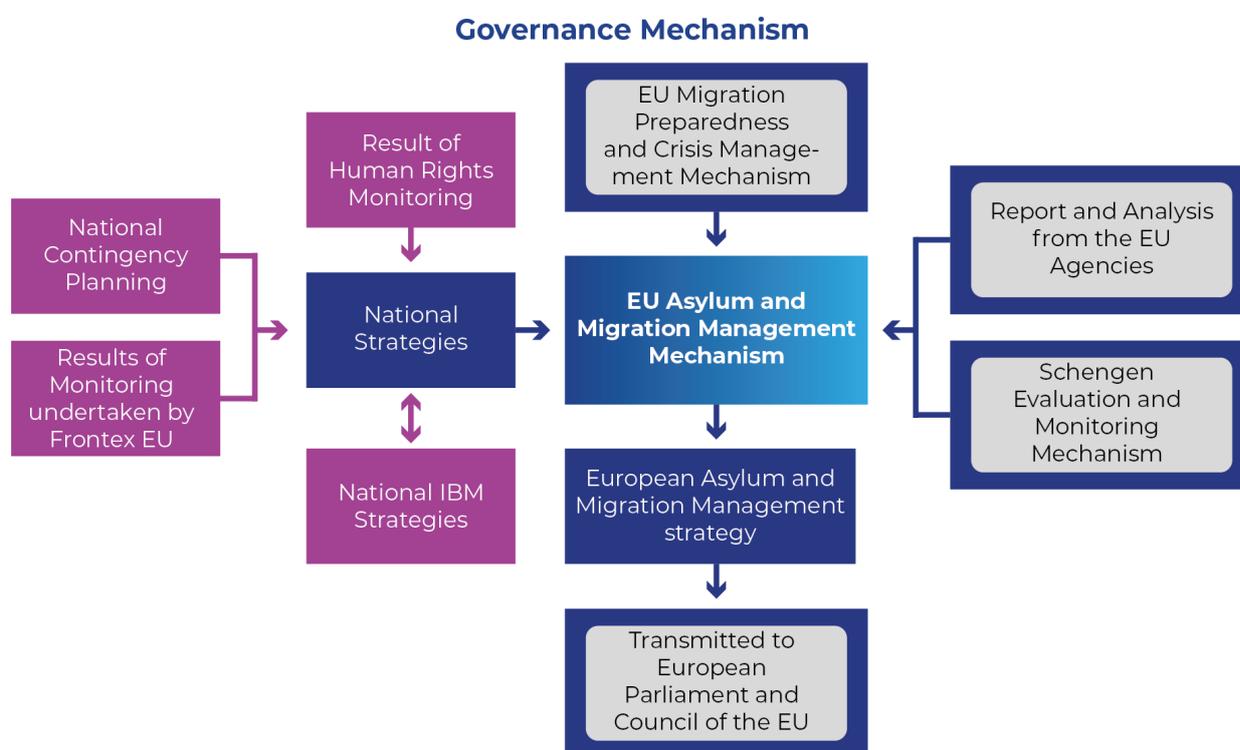
<sup>491</sup> Article 6(2) RAMM.

- National strategies that Member States are called to put in place pursuant to article 6(3), RAMM, to ensure sufficient capacity for the implementation of an effective asylum and migration management system;
- Information gathered by the Commission through the EU Migration Preparedness and Crisis Management Mechanism;
- Relevant reports and analyses from EU agencies;
- Information gathered through the Schengen evaluation and monitoring mechanism.<sup>492</sup>

**National strategies** shall be coherent with and complementary to the national strategies for integrated border management (IBM)<sup>493</sup> and developed by considering the following:

- Contingency planning set at the national level considering the planning made by the EBCG and the future EU asylum agency;
- Reports issued by the Commission in the framework of the EU Migration Preparedness and Crisis Management Mechanism;
- The results of the monitoring undertaken by the EBCG, the future EU asylum agency and the Fundamental Rights Monitoring Mechanism proposed by the Screening regulation;
- The results of the evaluation carried out under the framework of the Schengen evaluation and monitoring mechanism.

Figure 5.5:2 – Governance mechanism



Source: Ecorys, 2021.

<sup>492</sup> See article 4, Regulation (EU) 1053/2013.

<sup>493</sup> See article 8(6) Regulation (EU), 2019/1896.

No role is envisaged for the European Parliament and the Council in the development of the European asylum and migration management strategy, to which it is just 'transmitted'.<sup>494</sup> This is in stark contrast with the rules set for the adoption of the EU integrated border management multiannual strategic policy cycle, where the European Parliament and the Council are consulted before the adoption of the relevant strategic documents.<sup>495</sup> Furthermore, and in contrast to what is established for the case of national strategies, the European asylum and migration management strategy shall not be coordinated with the EU strategy for the integrated border management.

The Commission is also requested to adopt a yearly **Migration Management Report** including a short-term projection of the evolution of the migratory situation and the preparedness of the Union and the Member States.<sup>496</sup> The report is drafted considering the following:

- Information gathered by the Commission through the EU Migration Preparedness and Crisis Management Mechanism.
- The results of the monitoring undertaken by the EBCG, the future EU asylum agency and the Human Rights Monitoring Mechanism proposed by the Screening regulation.

This is complemented by a system of regular monitoring of the migratory situation through situational reporting by the Commission.<sup>497</sup>

It must also be recalled here that pursuant to article 51(1), when assessing if a Member State is experiencing a situation of migratory pressure, the Commission shall draw **Report on Migratory Pressure**. The Report, which is prepared in consultation with the Member State concerned, shall be submitted to the European Parliament and the Council within one month from the starting of the assessment.

### 5.5.2. The role of EU agencies

The role of EU agencies in the field of asylum and migration management has greatly increased over time, encompassing functions ranging from operational support offered to national authorities to monitoring and evaluation tasks.<sup>498</sup>

The European Border and Coast Guard Agency (Frontex) was originally set up in 2004, and its legal mandate has been revised and expanded four times since then (in 2007, 2011, 2016 and lastly in 2019). The Agency has gained operational powers, greatly expanding its role also in the field of return.<sup>499</sup>

The European Asylum Support Office (EASO) was set up in 2010, and its legal mandate has remained unchanged since then. This in spite of the de-facto operational role the Agency has played on the

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<sup>494</sup> Article 6(1), RAMM.

<sup>495</sup> See article 8(4) Regulation (EU), 2019/1896.

<sup>496</sup> Article 6(4), RAMM.

<sup>497</sup> Article 6(6), RAMM.

<sup>498</sup> For an overview see: Fink, M. (2018). *Frontex and Human Rights: Responsibility in 'multi-actor situations' under the ECHR and EU Public Liability Law*. Oxford University Press; Tsourdi, E. (2017). *Bottom-up salvation? From practical cooperation towards joint implementation through the European Asylum Support Office*. *European Papers-A Journal on Law and Integration*, 2016(3), pp. 997-1031; Ripoll Servent, A. (2018). *A new form of delegation in EU asylum: Agencies as proxies of strong regulators*. *JCMS: Journal of Common Market Studies*, 56(1), pp. 83-100.

<sup>499</sup> Gkliati, M. (2020). *Frontex Return Operations and their Human Rights Implications. Deportation of Foreigners: EU instruments, Nation-State practices and social actors' involvement*, Bern: Peter Lang Editions, Forthcoming.

field.<sup>500</sup> A proposal for a reform of the EU asylum agency was tabled in 2016, and then amended in 2018 to improve the operational profile of the proposed new European Union Agency on Asylum (EUAA).

The Commission communication on the new pact on migration and asylum recalls the Agencies' role, suggesting that the proposed measures will require 'enhanced monitoring and operational support by EU Agencies'.<sup>501</sup>

According to the principle of 'integrated policy-making' enshrined by Article 4 of the RAMM, Member States shall implement asylum and migration management policies in line with their national and EU strategies (see section 5.5.1 above) and with the support of Union Agencies.<sup>502</sup> In the RAMM it is also affirmed that a 'comprehensive approach to asylum and migration management' entails 'full deployment and use' of the operational support that can be offered by EU agencies.<sup>503</sup>

In spite of these statements of principle, **the new pact package does not alter in any significant way the legal mandate of EU agencies.** Thus, the competences of the EU agencies remain the same and will not undermine the sovereignty of the Member State.

For what concerns **Agencies' involvement in the new pre-entry stage**, Article 6(7) of the Screening proposal recognises that EU agencies (FRONTEX and the future EUAA in particular) may 'assist' or 'support' the competent authorities in all their tasks related to the screening. However, this should be done 'within the limits of their mandates'.<sup>504</sup>

In relation with the envisaged fundamental rights monitoring mechanism (see section 5.2.8 above), the Screening proposal establishes that the EU Fundamental Rights Agency (FRA) 'shall issue general guidance for Member States on the setting up of such mechanism and its independent functioning'.<sup>505</sup>

The FRA 'may' also be 'requested' to offer support to Member States 'in developing their national monitoring mechanism, including the safeguards for independence of such mechanisms, as well as the monitoring methodology and appropriate training schemes'.<sup>506</sup>

Compared with the role the Screening proposal envisages for FRONTEX and the future EUAA, FRA involvement is therefore limited. FRA will only offer advice on how to design the monitoring mechanism, whose actual functioning rests entirely in the hands of national authorities.

The amended Asylum Procedures Regulation is silent on the role of EU agencies in general and of the future EUAA specifically.<sup>507</sup> The explanatory memorandum to the proposal suggests that the Agency 'will monitor compliance with the Regulation by Member States through the monitoring mechanism, which the Commission proposed to establish in its revision of the mandate of the Agency',<sup>508</sup> but nothing is said regarding its possible involvement in the actual functioning of the new mandatory asylum border procedure.

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<sup>500</sup> Tsourdi, E., Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible? *German Law Journal*, 21(3), 506-531, 2020.

<sup>501</sup> COM(2020)609:6.

<sup>502</sup> Article 4(3), RAMM.

<sup>503</sup> Article 3(m), RAMM.

<sup>504</sup> Article 6(7) last paragraph, Screening proposal.

<sup>505</sup> Article 7(2), Screening proposal.

<sup>506</sup> Article 7(2), Screening proposal.

<sup>507</sup> Tsourdi, E. (2021) [The New Pact and EU Agencies: an ambivalent approach towards administrative integration](#).

<sup>508</sup> COM(2020)611:12.

In the words of Tsourdi, this is not in line with the current administrative realities and the pivotal role played by EASO in existing national variants of border procedures.<sup>509</sup>

EU agencies will also play a significant role in the **implementation of the solidarity mechanism** established by the RAMM. In particular, FRONTEX and the future EUAA will be directly responsible for drawing up, under the coordination of the Commission, the list of eligible persons to be relocated and to be subject to return sponsorship,<sup>510</sup> and will provide assistance to the Commission in 'coordinating' the 'operational aspects' of relocation and return sponsorship.<sup>511</sup> In addition, the agencies will also 'assist the Commission in monitoring the use of the solidarity pool'.<sup>512</sup>

When solidarity is offered in the form of capacity building or support in the external dimension, the Commission may be requested to coordinate the operational aspects of the measures offered by the contributing Member States. This may be done through the assistance offered by experts or teams deployed by FRONTEX and the future EUAA.<sup>513</sup>

Finally, the RAMM will increase the role both agencies already play in **orienting policy-making in the field of asylum and migration management** through their complex activity of risk analysis, monitoring and evaluation. In particular, it is envisaged that FRONTEX and the future EUAA will assist the Commission in drawing up the assessment of migratory pressure,<sup>514</sup> and that their analysis and vulnerability assessment shall be taken into account by the Commission when Member State's request to activate the specific procedures to deal with crisis situations.<sup>515</sup>

More generally, the results of the monitoring undertaken by FRONTEX and by the future EUAA are a key component for the development of the European asylum and migration management strategy and of the corresponding national strategies.<sup>516</sup>

## 5.6. Conclusions

We have seen in this chapter that the main novel elements that the pact proposes with regard to pre-entry procedures are mandatory screening at external borders, mandatory asylum procedures and return border procedures. These procedures are characterised by the fact that persons are not legally authorised to enter the territory. The pact, however, does not provide a rationale for the fiction of non-entry. Neither does it elaborate on the way in which non-entry is to be ensured. Non-governmental organisations have expressed their concern that non-entry in pre-entry procedures will imply excessive use of detention. It is unclear why the pact is silent on this point, considering that instances of *de facto* detention in border procedures have been documented extensively.

In times of crisis, pre-entry procedures may last for extended periods of time (a total of 290 days). As they can be applied to persons coming from countries with a recognition rate of 75 % or less, they will most certainly affect persons who have a high likelihood of being refugees or qualifying for subsidiary protection. Similarly, limitations to the right to remain during appeal procedures in a border procedure may affect the majority of applicants in times of crisis.

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<sup>509</sup> Tsourdi, E., [The New Pact and EU Agencies: an ambivalent approach towards administrative integration](#), EU Migration Law Blog, 2021.

<sup>510</sup> Article 49(2), RAMM.

<sup>511</sup> Article 49(5), RAMM.

<sup>512</sup> Article 49(2), RAMM.

<sup>513</sup> Article 60, RAMM.

<sup>514</sup> Article 50(2), RAMM.

<sup>515</sup> Article, 3(8), Crisis.

<sup>516</sup> See above.

The RAMM is to replace the Dublin system of responsibility sharing and introduce solidarity as a structural component of the CEAS. Solidarity is seen as a corrective mechanism to the functioning of the ordinary rules on the attribution of responsibility. The RAMM retains the first country of entry criterion. Moreover, the rules on responsibility in the RAMM are even expected to reinforce the responsibility of first countries of entry, as a consequence of the amendments on the rules on cessation of responsibility and shift of responsibility between Member States. The widening of the notion of 'family members' and increased flexibility in the rules on evidence necessary for establishing responsibility are intended to facilitate family reunification, and thus contribute to countering secondary movements.

Mandatory solidarity is only activated for search and rescue (SAR) cases, in cases of 'migratory pressures' or a 'situation of crisis'. Even in these cases, however, there are no assurances that a significant number of asylum seekers will be relocated. In particular, Member States may avoid relocation by choosing to offer solidarity in different ways. The procedures for offering solidarity give rise to heavy administrative burdens.

Return sponsorship is one of the ways in which Member States may offer solidarity instead of relocation. Under return sponsorship, it is not entirely clear what happens after the relocation of the person concerned. In particular, it is unclear if the Member State where the person is relocated shall issue a new return decision or if, in case of detention, the maximum length set by the Return Directive may be cumulated.

With regard to governance, the principle of integrated policy-making entails enhanced monitoring and operational support offered to Member States by EU agencies. Nevertheless, the new pact does not alter in any significant way the legal mandate of EU agencies.

### Key Findings

- The new pact will have an impact on safe pathways for migrants and asylum seekers, making more difficult for migrants and asylum seekers to secure territorial access and enhancing their dependency on irregular and/or illegal routes and exposure to criminal activity and networks;
- Given the mandatory nature of pre-entry screening and border procedures under the new pact, the number of people forcibly kept in border regions may increase significantly. Related proposals will enhance territorial unbalances of the reception system of frontline Member States;
- The mandatory border procedures and the minimum reception conditions create net benefits for all countries, of about €500 million at the EU level;
- Relocation creates inefficiencies due to moving asylum seekers back and forth and duplication of capacity-building. Nevertheless it is an attractive option for countries less affected by migrant flows because relocation is for only one year;
- Several Member State representatives and NGOs have noted that the redefinition of the rules on attribution of responsibility proposed under the new pact may have positive impacts on family reunification. However, it remains unclear if the new rules on family reunification will increase the number of successful take-charge requests;
- Overall, pre-entry procedures have a negative impact on fundamental rights. Particular concerns stand out on account of the ambiguity between the legal fiction of non-entry and detention, extended periods of time spent in detention and the exclusion of suspensive effect of appeals in border procedures; the reductions of the deadlines of asylum and return procedures save substantial costs, but these savings only outweigh the additional cost of other pre-screening requirements for preferred destination countries in the northwest of the EU.
- The compensation of €10 000 per migrant for relocation is insufficient to compensate for even one year of reception and thus ineffective to incentivize voluntary solidarity in the form of relocations.
- The solidarity mechanism envisaged by the RAMM will not be able to compensate for the distributive imbalances created by the new rules on allocation of responsibility. This, in particular, is a consequence of the fact that the system offers Member States many avenues to avoid being forced to relocate an asylum seeker on their territory;
- Return sponsorship is neither designed to facilitate the territorial redistribution of migrants within the EU, nor to alleviate the pressure on the asylum system of benefiting Member States. In addition, it may have a negative impact on the fundamental rights of migrants subject to the return procedures due to additional dangers in terms of fundamental rights protection. **Nevertheless, it is financially the most attractive for Member States other than the frontline Member States.**

## 6.1. Introduction

In this chapter, we will assess the social, fundamental rights, territorial and economic impacts of the new pact. In Chapter 5, we have identified the **four main building blocks** of the new pact: **pre-entry procedures, mechanisms for responsibility sharing and solidarity, immediate protection status, and governance framework**. We will assess the impacts of the three first blocks in Sections 6.2-6.4. The conclusions of our assessment are presented in Section 6.5, where we also discuss findings on additional impacts that could not be linked clearly to only one of the building blocks.

Below we present a brief explanation of the **overall methodology** applied for each impact dimension. At the beginning of each section, we will identify the particular elements that are central to our analysis of impacts in that section.

### 6.1.1. Fundamental rights and social impacts

With regard to this impact dimension, we will assess the likely impact of the new pact on the principles of **non-refoulement** and **non-discrimination**, as well as on the fundamental rights to **asylum, personal liberty, family life**, including **the rights of the child** and **effective remedies**. These rights have been identified by taking account of the interview data and desk research, which show that these rights are the most pertinent to be examined in the context of EU migration policy.<sup>517</sup> An assessment of the impact on the right to data protection is **not included**, except as regards the screening proposal. A full analysis of the pact's impact on this right would not be possible without including Eurodac.<sup>518</sup>

The impact of the pact on fundamental rights has been analysed by taking account of the EU Charter of Fundamental Rights and relevant case law, in particular by the CJEU and the ECtHR. We have also used the Commission's fundamental rights checklist, in particular, to assess justifications for **interferences** with non-absolute fundamental rights. However, as we shall set out below, the Pact's impact on fundamental rights is not always a question of clear-cut and well-defined limitations which are the result of specific proposals. Instead, we will see that in many cases, the Pact has a negative impact on **legal certainty** and **clarity**, precisely because of legal ambiguity in the proposals.

In addition, we will assess the expected impacts of the new pact in terms of **access to social and employment services** of applicants according to the Reception Conditions Directive, **public health and safety and crime**, including **human trafficking**. The data to assess social impacts is derived from the interviews and desk research conducted for the purposes of this study.

### 6.1.2. Territorial impact

With regard to this impact dimension, the aim is to assess what are the possible impacts of the new pre-entry procedures, of the mechanisms for responsibility sharing and solidarity, and of the immediate protection status on the **territorial distribution of asylum seekers** at EU level.

We adopted a **mixed methodological approach** to assess the territorial impact of the new pre-entry procedures. Our analysis is mainly based on desk research, interviews carried out with main

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<sup>517</sup> For a good overview of the pertinent human rights challenges in European migration policies, see J. Bast et al., *Human rights challenges to European migration policy*, REMAP study of 27 October 2020.

<sup>518</sup> We underline that Eurodac forms part of the Pact and its system, and further research is certainly warranted on how the Pact impacts on the right to data protection. Such an examination was not feasible to carry out in this IA, taking account of its scope and limitations, in terms of time and resources.

stakeholders and quantitative data analysis. In particular, in order to provide a quantitative estimation of the expected impact, our analysis focused on **Greece, Italy and Spain**. These three countries alone account for the 65 % of the unauthorised border crossings recorded between 2015 and 2019<sup>519</sup> and for the 20 % of first-time asylum applications recorded in the EU between 2015 and 2020.<sup>520</sup> Starting from existing data on the reception facilities in the three countries and on the number of unauthorised arrivals and asylum applications in the 2015-2020 period, we attempt an assessment of the changes (in terms of accommodation capacity and infrastructure) that would be needed to make the countries' reception system ready to implement the new pre-entry stage as envisaged by the pact. In particular, we take as a reference point **two different migration scenarios**: the first corresponding to the yearly average of arrivals and asylum applications recorded in the 2015-2017 period, when high numbers were recorded in Greece and Italy; the second to the 2018-2020 period, when, in parallel with a decreasing trend in Greece and Italy, Spanish numbers evolved in the opposite direction.

Conversely, the **methodological approach** followed in assessing the territorial impact of the mechanisms for responsibility sharing and solidarity and of the immediate protection status is mainly **qualitative**. The choice is in particular justified by the impossibility to make an accurate quantitative estimation of the territorial impacts of the proposed measures. In particular, in the absence of reliable data on secondary movements, it is not possible to predict how much the new rules on responsibility-sharing will affect the territorial distribution of asylum seekers between Member States. In addition, the implementation of many of the proposed measures will largely depend on discretionary decisions taken by the Commission or by Member States for which it is impossible to make predictions. Therefore, our assessment is based on desk research and the results of the interviews carried out with key stakeholders.

### 6.1.3. Economic impact

With regard to economic impacts, we used the available data to assess the expected economic and/or budgetary impacts (costs and benefits) of the proposed measures for the EU and for a selection of Member States. The **economic impact assessment is based on changes in the proposed measures compared to the current situation**, focusing on those that are expected to have the largest impacts, i.e. the pre-entry procedures, the solidarity mechanisms and the immediate protection status, which will have an impact particularly in times of migratory pressure or crisis. The **economic impacts are estimated at the level of four groups of countries**: countries that are mainly countries of first entry (Greece, Italy, Spain), countries along the Balkan route (Bulgaria, Croatia, Slovenia, Hungary, Austria), countries that are often preferred destinations (Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Netherlands, Sweden) and other EU Member States which are normally less affected by migrant flows.

## 6.2. Impacts of the proposed pre-entry procedures

In this section, we will analyse the impacts of the new pre-entry procedures proposed by the new pact. We start with the **social and fundamental rights impact** of pre-entry procedures. We then turn to the territorial impacts of these procedures, after which we address their economic impacts.

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<sup>519</sup> Elaboration on data retrieved from [Frontex risk analysis](#), [UNHCR](#) and [Italian Interior Ministry](#).

<sup>520</sup> Elaboration on Eurostat data.

### 6.2.1. Social and fundamental rights impacts of pre-entry procedures

We will begin with an assessment of the **social and fundamental rights** impacts of the **external dimension** of the new pact, after which we will turn to its impact on **the right to asylum and access to the asylum procedure**. We will then discuss the impact of pre-entry procedures on **the right to personal liberty** and their implications for **accommodation, local communities and integration**. After this, we will assess impacts on the **right to data protection**, the **protection of minors** and the **right to non-discrimination**. Next, we will assess the impact on **non-refoulement, effective remedies** and **procedural guarantees**. We will conclude with a discussion of the monitoring mechanism proposed.

### 6.2.2. The external dimension

Pre-entry procedures aim to ensure that migrants are not authorised to enter the territory of the Member States upon arrival. It thus makes sense to discuss under this heading also possible impacts of the new pact with regard to the **pre-arrival stage**.

#### Safe pathways

Under the current legal framework, legal migration to a Member State can take place through various channels and mechanisms. These include a variety of labour migration schemes as well as regular mobility schemes.<sup>521</sup> However, as exemplified by the record number of people escaping the conflict in Syria in 2015, individuals fleeing countries at war or oppression have more limited options. This may lead them to choose irregular and often unsafe pathways to the EU.

Representatives from various NGOs raised concerns about the new pact's **potential impact on safe pathways for migrants and asylum seekers coming to the EU**. They argued that the new pact offers no ambitious proposals to discourage irregular migration and associated routes, thereby failing to provide safer pathways for migrants and asylum seekers when compared with the status quo.<sup>522</sup> Similarly, through the increased focus on border control of the Member States of entry, the new pact may make it more difficult to secure territorial access for migrants and asylum seekers, thereby enhancing their dependency on irregular and/or illegal routes.

#### SARs

Against the background of safe pathways, SAR's raise particular human rights concerns.<sup>523</sup> The precise legal obligations of actors dealing with boat migrants at sea are complex to establish, as they result from different bodies of law, such as the SAR regime, international refugee law, international human rights law, the law of the sea, and the human smuggling and trafficking framework.<sup>524</sup> The new pact addresses SARs specifically by allocating responsibility and setting up a mechanism on relocation after SARs.<sup>525</sup> This may **prevent stand-offs**, in which no Member State is willing to allow disembarkation of ships carrying migrants. At the same time, the new pact does **not propose any specific solution** with regard to 'the protection of seaborne migrants and refugees nor on the

<sup>521</sup> Luyten, K., and González Díaz, S., [Legal migration to the EU](#), EPRS, European Parliament, p. 1.

<sup>522</sup> See international NGO representatives of PICUM, ECRE and Red Cross EU Office.

<sup>523</sup> EPRS, [The Cost of Non-Europe Report in Asylum Policy](#), 2018, pp. 6-7.

<sup>524</sup> A. Radjenovic, Pushbacks at the EU's external borders, EPRS Briefing, 2021, p. 6.

<sup>525</sup> See Chapter 5 of this report. See also the *recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities*, C(2020) 6468 final.

elimination of the structural factors that push them to take the sea to reach safety in the first place'.<sup>526</sup>

#### Protection from crime and trafficking

Migrant smuggling continues to be associated with serious human rights violations, deaths and criminal activity, including human trafficking. According to an NGO representative, criminal networks in Sicily continue to exploit irregular migrants by forcing them into sexual exploitation.<sup>527</sup>

The new pact states that the Commission will present a new EU action plan against migrant smuggling for the period 2021-2025, which follows up on the first EU action plan against migrant smuggling adopted in May 2015.<sup>528</sup> However, in spite of such efforts, representatives from various national and international NGOs have voiced scepticism regarding the new pact's expected impact on irregular migrants' exposure to crime. More specifically, when interviewed, one NGO noted that due to the proposed new pact's alleged failure to promote legal migration and legal pathways, migrants and asylum seekers will continue to depend on irregular routes. This, in turn, furthers the risk of their exploitation by criminal groups in the EU as well as in their countries of origin and transit.

### 6.2.3. Access to asylum procedures and the right to remain at external borders

EU law protects the right to asylum (Article 78 TFEU and Article 18 Charter). It also provides for the prohibition of collective expulsion and the principle of non-refoulement (Article 19 Charter). Some provisions in the screening regulation and the APR, while not imposing any direct limitations on the right to asylum and protection from non-refoulement, may impact negatively on the **legal clarity** or the **effectiveness** of the protection of these rights at external borders. This is particularly so on account of (1) delayed access to the procedure as a result of screening, (2) the absence of a right to remain for applicants during screening and (3) no clear justification for the legal fiction of non-entry.

#### Delays in access to the asylum procedure

Screening may last for a maximum duration of five days, which can be extended by another five days in 'exceptional circumstances'.<sup>529</sup> After this period of time, the persons concerned will be referred to the appropriate procedure. For asylum seekers, the provisions in the APR regulating time limits for registering their applications will only become applicable **after the screening has ended**.<sup>530</sup> As a result, a substantive period of time can pass before applications for asylum are registered by the Member States. According to the Court of Justice, 'effective, easy and rapid access to the procedure' guarantees the **effectiveness of the right to asylum** protected by Article 18 of the Charter.<sup>531</sup> As the time limits proposed by the Screening regulation are more lenient than those

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<sup>526</sup> Violeta Moreno-Lax, '[A New Common European Approach to Search and Rescue?](#) Entrenching Proactive Containment', EU Migration Law Blog, 3 February 2021,; and Violeta Moreno-Lax (2018) The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm. *JCMS: Journal of Common Market Studies*, 56: 119– 140.

<sup>527</sup> Data from the IOM's Displacement Tracking Matrix Flow Monitoring Survey suggests that, out of 12,000 migrants aged 14 and above who travelled along different migration routes across the Mediterranean between 2016-2018, between 66 and 77 % of respondents each year indicated having experienced one or more forms of direct exploitation and abuse during their journey. See Bartolini, L., and Zakoska-Todorovska, I., [Vulnerability to exploitation and abuse along the Mediterranean migration routes to Italy](#), September 2020 p. 189-182.

<sup>528</sup> COM(2015) 285, [EU Action Plan against migrant smuggling \(2015 – 2020\)](#), European Commission website.

<sup>529</sup> Defined as circumstances 'where a disproportionate number of third-country nationals needs to be subject to the screening at the same time.' See Screening proposal, COM(2020) 612, Article 3, also on time limits for screening.

<sup>530</sup> Screening Proposal, COM (2020) 612 final, explanatory memorandum, p. 5.

<sup>531</sup> Case 808/18, *Commission v. Hungary*, 17 December 2020, paras 102-106.

applicable under current EU law, the proposed changes entail **delayed access to the procedure** and thus have a **negative impact** on effective protection of the right to asylum.<sup>532</sup>

#### The absence of a right to remain during screening

Persons subject to the screening are present on the territory of the Member States. Therefore, the Charter and the ECHR are applicable.<sup>533</sup> Indeed, the **legal fiction of non-entry** 'cannot affect the applicability of fundamental rights guarantees, including, in particular, the prohibition of non-refoulement'<sup>534</sup>. Nevertheless, the fact that the third-country nationals are not formally authorised to enter the territory has been criticised as complicating the relationship between the screened individual and the screening authority,<sup>535</sup> possibly even undermining the right to asylum under the Charter.<sup>536</sup>

On the basis of the Reception Conditions Directive, applicants for asylum have a right to remain in the Member States, including at the borders or in transit zones.<sup>537</sup> However, the screening proposal **excludes the legal effects of the Reception Conditions Directive until after the screening.**<sup>538</sup> Therefore, as a result of the introduction of a screening phase, **secondary EU law would no longer guarantee the right to remain for asylum seekers** from the moment they express the wish to apply for asylum, as is the case under the current rules, until the screening has ended. The right to remain ensures effectiveness of the right to asylum, and it protects against non-refoulement. Therefore, the changes proposed, when compared to the current rules, have a **negative impact** on the **effectiveness and legal clarity** of the protection of the right to asylum and the principle of non-refoulement.

#### No justification for non-entry in pre-entry procedures

Both with regard to the screening and the asylum and return border procedures, the legal instruments in the new pact fail to provide a **justification for the rationale for the fiction of non-entry**. This jeopardises legal clarity with regard to the protection of the fundamental rights of third-country nationals. Against this context, ECRE recommends that 'the legal fiction of non-entry is removed from the proposals, and that applicants are legally considered to have entered the territory of the EU Member States'<sup>539</sup>.

Protection of the right to asylum and non-refoulement, and other fundamental rights, is theoretically possible without entry being formally authorised.<sup>540</sup> However, as we will set out in more detail below, the fiction of non-entry has implications for effective protection of the rights of migrants, for example, when it concerns their right to personal liberty or the protection of their basic

<sup>532</sup> ECRE (2020), Comments on the Commission proposal for a screening regulation COM(2020)612, Brussels, p. 9. See also Violeta Moreno-Lax et al, '[The EU Approach on Migration in the Mediterranean](#)', IPOL, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, June 2021, p. 38.

<sup>533</sup> Article 1 ECHR and Article 51 Charter.

<sup>534</sup> ECRE, COMMENTS ON THE COMMISSION PROPOSAL FOR A SCREENING REGULATION COM(2020) 612, 2020, p. 13.

<sup>535</sup> Meijers Committee, Comments on the Migration Pact – Asylum Screening Regulation, 2020, CM2010.

<sup>536</sup> ECRE, COMMENTS ON THE COMMISSION PROPOSAL FOR A SCREENING REGULATION COM(2020) 612, 2020. See also Migration Pact Impact Assessment Country Research for Spain on the basis of desk research and an interview with the Comisión Española de Ayuda al Refugiado (CEAR), Ecorys, 2021; Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021.

<sup>537</sup> Article 2(h) and Article 9, Reception Conditions Directive.

<sup>538</sup> Screening Proposal, COM (2020) 612 final, Explanatory Memorandum, p. 5.

<sup>539</sup> ECRE COMMENTS ON THE COMMISSION PROPOSAL FOR A SCREENING REGULATION COM(2020) 612, 2020, p. 13.

<sup>540</sup> See for example ECtHR 28 January 2008, *Saadi v UK*, App. No. 13229/03 (Grand Chamber).

needs. More generally, the legal fiction of non-entry needs a clear justification, seeing that disjunction between factual presence on the territory and legal qualification, which in situations of crisis may last **more than 41 weeks, complicates the effective protection of individual rights**.<sup>541</sup> Most obviously, non-entry may negatively impact the access of NGOs to migrants at external borders to provide them with support and legal assistance.<sup>542</sup>

#### 6.2.4. The Right to Personal Liberty and Accommodation at External Borders

Article 6 of the Charter protects the **right to personal liberty**. The right to personal liberty is not an absolute right. Therefore, limitations are allowed, but only if such limitations genuinely meet an objective of general interest recognised by the EU, and only in so far as they are strictly **necessary and proportionate** to these objectives. Such necessity and proportionality can only be established on the basis of an **individual assessment**.<sup>543</sup> As further outlined below, pre-entry procedures may have a negative impact on the right to personal liberty on account of a **lack of clarity in the new pact on the relationship between the fiction of non-entry and detention**. In this respect, it should be highlighted that, until 2016, the Commission consistently argued that border procedures imply detention. Nevertheless, it has adopted a different approach in the new pact, maintaining that border procedures can be applied without detention.

Moreover, the proposed rules on the **grounds of detention** in the proposed return border procedure do not reflect **the requirements for lawful detention** under the Charter and case law of the CJEU. We observe that negative impacts are also expected because of the **disproportionate duration of detention** in pre-entry procedures. Additionally, non-entry procedures exert negative impacts on the social dimension on account of accommodation at external borders.

##### Detention and the fiction of non-entry

The new pact provides **limited clarity on the relationship between pre-entry procedures and detention**. The screening regulation 'leaves the determination in which situations the screening requires detention and the modalities thereof [...] to national law.' However, according to Recital 12 of the Proposal, Member States are 'required to apply measures pursuant to national law to prevent the persons concerned from entering the territory during the screening', which 'in individual cases may include detention'. Article 3 of the Proposal obliges Member States to make sure that persons shall not be authorised to enter the territory of a Member State during the screening.<sup>544</sup> In the SWD, the Commission writes that 'during the screening, migrants would be **held** by competent national authorities'.<sup>545</sup>

In the **asylum border procedure**, it is similarly opaque how **the fiction of non-entry relates to applicants' right to personal liberty**. According to the amended proposal for an Asylum Procedures Regulation, 'the border procedure for the examination of an application for international

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<sup>541</sup> ECRE, COMMENTS ON THE COMMISSION PROPOSAL FOR A SCREENING REGULATION COM(2020) 612, 2020. See also EPRS, Asylum procedures at the border, European implementation assessment, November 2020.

<sup>542</sup> Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021.

<sup>543</sup> Case C-601/15 PPU, *J.N.*, ECLI:EU:C:2016:84.

<sup>544</sup> This obligation does not apply when it concerns third-country nationals found within the territory of the Member States who have irregularly crossed an external border, but who may also be referred to the screening procedure. See Screening Proposal, COM (2020) 612 final, Articles 4 and 5.

<sup>545</sup> SWD (2020) 207 final, para 5.1.2.

protection can be applied without recourse to detention'.<sup>546</sup> This is difficult to reconcile with the Explanatory Memorandum of the 2016 Proposal for the APR, in which the Commission wrote that border procedures '**normally imply the use of detention throughout the procedure**'.<sup>547</sup> There is no justification in the pact for the change of position on such a crucial aspect of the APR.<sup>548</sup>

Most non-governmental interviewees expressed concern that the fiction of non-entry in the screening and border procedures implies an **excessive use of detention**.<sup>549</sup> To what extent policies of non-entry at the external border as foreseen in the screening and border procedures interfere with the right to personal liberty raises complex issues of fact and law. Here, the difference between detention and mere restrictions on freedom of movement is one of degree and intensity, not of nature.<sup>550</sup> That being said, the particular legal constellation of EU law is such that in most cases, the 'holding' of applicants for asylum at the border or in transit zones before entry is granted will amount to detention.<sup>551</sup> In recent case law concerning border procedures, the CJEU defined detention under EU law as 'a coercive measure that deprives [an] applicant of his or her freedom of movement by requiring him or her to remain permanently within a restricted and closed perimeter'.<sup>552</sup> The possibility to leave this area will not call into question the assessment of a situation as detention if this is either not a legal possibility or results in forfeiting the right to asylum.<sup>553</sup> It is also worth underlining that in 2013, the Commission was of the opinion that asylum border procedures could 'only [be used] in exceptional circumstances since they imply detention'.<sup>554</sup> Moreover, as outlined above, in the 2016 Proposal for the APR, it reaffirmed that border procedures '**normally imply the use of detention throughout the procedure**'.<sup>555</sup>

<sup>546</sup> According to the Recital of the APR, 'Member States should be able to apply the grounds for detention during the border procedure in accordance with the Reception Conditions Directive.' Whereas the use of detention during the screening phase is thus left to national law, it is to be regulated by EU law during the border procedure. Article 8(1)(d) of the Proposal for a recast of the Reception Conditions Directive provides for detention in order to decide in the context of a border procedure on the applicants right to enter the territory.

<sup>547</sup> COM(2016) 467 final, explanatory memorandum, p. 15.

<sup>548</sup> It can be speculated that political motivations are behind this change, as border procedures in particular were one of the stumbling blocks in reaching political agreement over the 2016 Proposal for the APR. See Council of the European Union, *Note from the Presidency to: Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)*, 13376/18, LIMITE, 19 October 2018.

<sup>549</sup> Migration Pact Impact Assessment interview with Meijers Committee, Ecorys, 2021; Migration Pact Impact Assessment Country Research for Spain on the basis of desk research and an interview with the Comisión Española de Ayuda al Refugiado (CEAR), Ecorys, 2021; Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021; Migration Pact Impact Assessment Country Research for Germany on the basis of desk research and interviews with the German Federal Ministry of the Interior, the German Red Cross and the Jesuiten Flüchtlingsdienst Deutschland, Ecorys, 2021. These concerns are supported by the available data, see for example, International Commission of Jurists, [Briefing paper: Detention in the EU Migration and Asylum Pact proposals](#), 2021.

<sup>550</sup> ECHR 6 November 1980, *Guzzardi v Italy*, App. No. 7367/76. For a detailed discussion on the different approaches between the ECtHR and the Court of Justice on this matter, see Cornelisse and Reneman, EPRS implementation assessment: [Legal assessment of the implementation of Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection](#), November 2020.

<sup>551</sup> See ECRE comments on the APR, 2020, pp. 17-21. See also Cornelisse, G. N. (2020). [Borders, Procedures and Rights at Röscke: Reflections on Case C-924/19 \(PPU\)](#). Online publication or Website, European Database of Asylum Law.

<sup>552</sup> Case 924/19, *FMS*, ECLI:EU:C:2020:367, para 223. See also Case 808/18, *Commission v. Hungary*, 17 December 2020.

<sup>553</sup> *Idib*.

<sup>554</sup> COM(2013) 411 final, p. 4.

<sup>555</sup> COM(2016) 467 final, explanatory memorandum, p. 15.

Likewise, the Pact is silent on the question **to what extent return border procedures involve detention**. Article 41a in the Amended Proposal for an Asylum Procedures Regulation states that persons whose applications are rejected in the asylum border procedure 'shall be **kept** for a period not exceeding 12 weeks in locations at or in proximity to the external border or transit zones; where a Member State cannot accommodate them in those locations, it can resort to the use of other locations within its territory.' In spite of the use of the term 'kept' in this provision, the Commission reflects neither in the proposed APR nor in any other document on how return border procedures relate to the right to personal liberty of detainees; more specifically, it fails to address the question under which conditions these procedures involve detention. In the SWD, it writes in 'irregular migrants in a return border procedure would not be subject to detention as a rule'.<sup>556</sup>

By leaving the legal qualification of the measures that are to prevent persons from entering the territory during screening to national law, while at the same time obliging Member States to ensure that these people do not enter the territory, the new pact may have a **negative impact on the right to personal liberty** of refugees and other migrants, potentially **facilitating instances of de facto detention** (detention without a clear legal basis and no procedural safeguards). This can be expected as practices of *de facto* detention at external borders in order to prevent people from entering are widespread even under the current rules, where Member States are not yet under an **obligation to prevent entry**.<sup>557</sup> Similarly, the opacity of the new pact on how non-entry is to be ensured in the asylum and return border procedures has a **negative impact on the legal clarity** of the protection of the right to liberty.

In conclusion, the asylum and return border procedures in the proposal for an amended APR **are likely to enhance existing problems of de facto detention by not solving the legal ambiguity surrounding the qualification of the stay of third-country nationals during pre-entry procedures**.<sup>558</sup> Similarly, the proposal for the Screening regulation, by leaving it up to national law whether or not to use detention during the screening phase, will not bring about uniform protection of the right to liberty across the Member States. It may **contribute instead to instances of de facto detention**. It is unclear how the monitoring mechanism (to be addressed below in section 6.2.7) can ensure adequate protection of the right to liberty in the absence of common European rules on this matter.

Moreover, both the Reception Conditions Directive and the Return Directive contain guarantees that are to ensure that detention is an **individual, necessary and proportionate measure**, as is also required by the Charter.<sup>559</sup> These guarantees also apply in theory during asylum and return

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<sup>556</sup> Adding that detention may be applied 'when it is necessary to prevent irregular entry, or there is a risk of absconding, of hampering return, or a threat to public order or national security. See SWD (2020) 207 final, para 5.1.3. For further discussion, see below.

<sup>557</sup> EPRS, [Asylum Procedures at the Border](#), European Implementation Assessment, November 2020, Cornelisse, G, Reneman, M. 'Border procedures in the Commission's New Pact on Migration and Asylum: A case of politics outplaying rationality?' *Eur Law J.* 2021; 1– 18.; and Grusa Matevic, Crossing a Red Line, [How How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry](#): Case Studies on Bulgaria, Greece, Hungary, and Italy, 2019.

<sup>558</sup> In this regard, Cornelisse and Reneman argue that the rules on border procedures should require a qualification of the measures used to secure non-entry (as either detention or restrictions on freedom of movement). This qualification and the lawfulness of these measures should be reviewed by a court *ex officio*. See EPRS, [Asylum Procedures at the Border, European Implementation Assessment, Part II, legal assessment](#), November 2020; and Cornelisse, G, Reneman, M. 'Border procedures in the Commission's New Pact on Migration and Asylum: A case of politics outplaying rationality?' *Eur Law J.* 2021; 1– 18.

<sup>559</sup> Articles 6 and 52 Charter, Case C-601/15 PPU, *JN*, ECLI:EU:C:2016:84.

border procedures.<sup>560</sup> As Member States are implementing EU law during the screening, detention during screening needs to satisfy the same requirements.<sup>561</sup> However, **blanket non-entry policies** for all migrants (during screening, thus including refugees),<sup>562</sup> or particular categories of migrants (in case of the mandatory border procedure or for rejected asylum seekers in the return border procedure), makes it **impossible to ensure compliance with the guarantees in the Reception Conditions Directive and the Return Directive.**<sup>563</sup>

#### Grounds for detention in pre-entry procedures

As outlined above, a crucial issue with regard to detention in pre-entry procedures is the fact that **blanket policies of non-entry are not reconcilable with the usual guarantees applicable in cases of deprivation of liberty.** Therefore, we do not address in detail the grounds for detention which the Commission proposes in a return border procedure.<sup>564</sup> Most of these grounds correspond to existing or proposed rules in the Reception Conditions Directive and the Return Directive (risk of absconding, avoiding or hampering the return procedure, preventing entry). Detention can also be used to prepare the return or carry out the removal process if persons have previously been detained in an asylum border procedure. However, the APR does not stipulate clearly that **detention can only be used in a return border procedure if it is necessary in an individual case and if other, less coercive measures would not be sufficient.**<sup>565</sup> By not including these requirements in the APR, the proposed limitations to the right to liberty in the APR do not satisfy the requirement that **limitations on fundamental rights do not go beyond what is necessary to attain the objective of effective returns and preventing entry.**

Moreover, the proposed Crisis Regulation introduces two situations in addition to the ones set in the Proposal for a recast Return Directive, in which the **existence of a risk of absconding in individual cases can be presumed unless proven otherwise.** In EU return procedures, a risk of absconding provides the basis for using detention.<sup>566</sup> It is unclear how and why the existence of a crisis should alter the assessment of an objective and individually-based criterion such as the risk of absconding. It is similarly unclear what objectives are served by lowering the threshold for using detention in times of crisis. More importantly, however, a **rebuttable presumption in favour of detention** is not in line with the requirement that **any limitation to personal liberty should be assessed individually, be proportionate and not go beyond what is absolutely necessary.**<sup>567</sup>

<sup>560</sup> See Amended Proposal for APR, COM(2020) 611 final, Article 41 para 9.

<sup>561</sup> Article 51 Charter.

<sup>562</sup> Raising also question as regards conformity with the 1951 Refugee Convention, EPRS, [Asylum Procedures at the Border, European Implementation Assessment, Part II, legal assessment](#), November 2020.

<sup>563</sup> For example, under the current rules, many Member States apply a border procedure to anyone applying for asylum upon arrival at an external border, and the accompanying detention measure is not subject to an individualised assessment nor to a full proportionality assessment, precisely because the interest of external border control and non-entry overrides individual considerations. See EPRS border procedures, for example Germany airport procedure, Netherlands border procedure at Schiphol. See also ECRE, etc. Special circumstance, but this is proportionality *strictu sensu*. In some instances, as already mentioned, the factual deprivation of liberty is not even qualified as detention, see The German airport procedure for example.

<sup>564</sup> Amended Proposal for APR, COM(2020) 611 final, Article 41a, paras 5 and 6.

<sup>565</sup> Charter, Articles 6 and 52; and Case C-601/15 PPU, *JN*, ECLI:EU:C:2016:84.

<sup>566</sup> See Article 18 of the proposed Recast of the Return Directive.

<sup>567</sup> Charter, Articles 6 and 52; and Case C-601/15 PPU, *JN*, ECLI:EU:C:2016:84.

### Duration of detention in pre-entry procedures

As explained above, border procedures can take 12 weeks to be extended by another 8 weeks in cases of crisis. As pre-entry procedures imply detention, the lawfulness of such prolonged detention can be questioned in light of the proportionality requirement under Article 6 of the Charter and the requirements of lawful detention under Article 5 ECHR.<sup>568</sup>

In *Saadi*, the ECtHR held that border detention in the context of fast track asylum procedures 'for **seven days** could not be said to have exceeded the period reasonably required to enable [the] claim to asylum to be processed speedily'.<sup>569</sup> However, the new pact proposes **12 weeks** for such procedures, which may even be extended by **another 8 weeks** in times of crisis. If, after the rejection of the asylum claim, detention is also used in the border return procedure, **migrants may be detained for a total of more than 41 weeks** at external borders.<sup>570</sup> Especially in view of the **absence of an individualised assessment of the necessity and proportionality** of the measure (see above), such **extended periods** of detention **violate the right to personal liberty**.<sup>571</sup>

### Impact of accommodation at external borders

Aside from the legal qualification of the stay at the border in pre-entry procedures, the fiction of non-entry means that persons will need to be **accommodated at or close to the external borders of the EU**. The new pact proposes changes to the current border procedure as regards location. It would also be possible to conduct that procedure 'at other locations, should capacity become stretched'.<sup>572</sup> Still, concerns have been widespread that the pre-entry procedures introduced by the new pact make the current hotspot approach the default modus for all arrivals at the external borders of Europe; albeit without introducing clear measures to prevent well-documented violations of human rights.<sup>573</sup>

It has been argued the new pact 'risks to foster the model of large hosting centres, especially in countries tasked with controlling the external borders of the European Union'.<sup>574</sup> The dangers that accommodation in these types of centres pose for the physical and mental health of migrants are well documented.<sup>575</sup> **Mechanisms to ensure adequate reception conditions** and avoid overcrowding are not included in the proposed legislation, except for **reliance on time limits**. However, shorter time limits already apply under the current legal framework, and these have not been able to prevent inadequate living conditions in the hotspots.<sup>576</sup> Persons subjected to screening do not fall under the scope of the Reception Conditions Directive, and as such, the new pact does

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<sup>568</sup> Charter, Articles 6 and 52; and Case C-601/15 PPU, *JN*, ECLI:EU:C:2016:84.

<sup>569</sup> ECtHR 29 January 2008, *Saadi v. United Kingdom*, App. no. 13229/03 (Grand Chamber).

<sup>570</sup> This is the period of ten days for screening, combined with the periods allowed for extended asylum and return border procedures, see Chapter 5 of this report.

<sup>571</sup> Moreover, it raises questions as regards conformity with the Refugee Convention. See for more on this: EPRS, [Asylum Procedures at the Border, European Implementation Assessment, Part II, legal assessment](#), November. Please note that the duration of the detention is only one of the aspects to be assessed with regard to its lawfulness in the case law of the ECtHR. We argue that the absence of an individualised assessment of proportionality and necessity of the detention measure is in itself in violation of the right to personal liberty as protected in the EU legal order, and that such extended durations exacerbate this negative impact.

<sup>572</sup> SWD (2020) 207 final, p. 74.

<sup>573</sup> Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy February 2019.

<sup>574</sup> Wessels, J. (2021). [Producing more Morias across Europe?](#) Questioning the Commission's vision for border procedures. Online publication or Website, PROTECT Blog.

<sup>575</sup> Barbieri, Alberto. 'Time to rethink large refugee centres in Europe.' *The Lancet Public Health* 6.1, 2021.

<sup>576</sup> CM2014 Meijers Committee Comments on the Migration Pact – Asylum Procedures Regulation.

not propose rules on their reception and accommodation. The same applies to persons in return border procedures. Against the background of **current problems relating to the conditions of accommodation** of applicants in frontline Member States, and the differences between Member States as regards reception conditions, the **absence of detailed rules on accommodation** during screening and border procedures is likely to have a **negative impact on the protection of the mental and physical health of migrants**.<sup>577</sup>

#### Access to public health and social services of applicants during the border procedure

The Reception Conditions Directive lays out various stipulations regarding the **minimum access to public health and social services** of asylum applicants in the EU.<sup>578</sup> However, the extent to which such services are ensured in full during the asylum application process varies greatly between Member States. Open-source research and expert interviews with national authorities suggest that Sweden – which does not currently apply a border procedure – provides free healthcare (including psychological support), housing, monthly financial aid and, under certain conditions, access to the Swedish labour market for asylum seekers during the entirety of their asylum application process.<sup>579</sup>

National authorities from Sweden noted that they did not expect the new pact to have a significant impact on the public health and social services offered to asylum seekers as Sweden already ensures such services at a high level. As stated by Italian national authorities, with regard to social protection, asylum seekers and holders of international protection permits are able to access the welfare system, including health, social security services and education under the current system. However, national representatives from Italy have also stated that access to public health services for applicants during the border procedure could potentially be negatively affected by the new pact if its proposed measures lead to the **screening procedure taking place in so-called hotspots**, where the high concentration of migrants and asylum applicants hinders effective access to public health.

#### Social impacts for local communities and the integration of migrants

Moreover, representatives from international and Italian NGOs have suggested that the new pact may have a detrimental impact on local communities. Representatives from the Italian Refugee Council stated that measures in the new pact could lead to the creation of **large, overcrowded reception centres**, which might create a challenging co-living environment for local residents.<sup>580</sup> Similarly, various international NGOs highlighted that **racism towards migrants** could increase in local communities should the proposed new pact lead to the **creation of more and/or larger reception facilities** across the Member States.<sup>581</sup>

Representatives from the Ministry of Migration and Asylum of Greece (MoMA) have noted that the new pact may have a negative impact on the **integration of migrants**. More specifically, if all reception locations referred to in the proposed new pact are to be located at the EU's external borders, for the case of Greece, they would inevitably be set at Evros, bordering Turkey, and on the country's islands. In such a scenario, MoMA representatives noted that the **proposed border measures would not address integrational issues faced by migrants and asylum seekers in the**

<sup>577</sup> See Migration Pact Impact Assessment interview with Platform for International Cooperation on Undocumented Migrants (PICUM), Ecorys, 2021.

<sup>578</sup> [The Common European Asylum System \(CEAS\)](#), European Commission, July 2016.

<sup>579</sup> [EMN Annual Report on Migration and asylum 2019 – Sweden](#), The Swedish Migration Agency & European Migration Network, 2020, pp. 31.

<sup>580</sup> Migration Pact Impact Assessment Country research for Italy, Ecorys, 2021.

<sup>581</sup> As documented on the Greek Islands, see for example UNHCR, [Refugees in Greece still exposed to racist violence](#), 21 March 2019.

**Member States**, as they would have worse access to adequate healthcare, education, and the Greek labour market in such locations compared to larger cities, such as Athens and Thessaloniki.<sup>582</sup>

### 6.2.5. Impact of the screening on data protection

The **screening proposal it is likely to impinge on the rights to respect for private life and for the protection of personal data** as enshrined in Article 7 and 8 of the Charter of Fundamental Rights of the European Union.

In particular, article 10(1)(b) of the Screening proposal suggests that Member States can also use 'data or information provided by or obtained from the third-country national concerned'. This can be read as **legitimising many of the dubious practices used by Member States to support identity verification processes** in the absence of documentary evidence – such as exploiting the information contained in smart phones – which are likely to seriously interfere with the rights to data protection and privacy of third country nationals.<sup>583</sup>

The screening proposal also allows the use of existing databases for performing 'security checks' on all TCNs crossing the external borders of the EU or apprehended within the territory of the Member State concerned, including asylum seekers. This may result in **expanding the use of information systems for security purposes beyond the limits foreseen in relation to law enforcement access to EU migration databases**.<sup>584</sup>

The screening entails the collection of a significant amount of data on the individuals concerned. It is therefore to be considered a form 'of processing of personal data'.<sup>585</sup> As such, it is covered by the General Data Protection Regulation (GDPR).<sup>586</sup> However, the current version the **Screening proposal does not include a procedure to raise concerns regarding the information collected in the de-briefing form** – and eventually request correction and erasure of inaccurate data.<sup>587</sup>

### 6.2.6. Children and unaccompanied minors, persons with special needs

Due to the use of detention and decreased procedural safeguards, it has been argued that **border procedures are not suitable for minors and persons with special needs**.<sup>588</sup> However, the new pact does not exclude persons with special needs from these procedures, only determining that Member States shall not apply or cease to apply the border procedure if the **necessary support cannot be provided** to applicants with special procedural needs or where there are medical reasons for not applying the border procedure.<sup>589</sup> Seeing that **adequate mechanisms for identifying**

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<sup>582</sup> Migration Pact Impact Assessment Country research for Greece, Ecorys, 2021.

<sup>583</sup> EDPS, *Opinion on the New Pact on Migration and Asylum*. Brussels, 2020, § 10.

<sup>584</sup> Meijers Committee, Comments on the Migration Pact – Asylum Screening Regulation, November 2020, p. 6; ECRE, *Comments on the Commission proposal for a screening regulation*, cit., p. 25. On existing standards of necessity and proportionality justifying the use of large-scale database for security purposes, see ECtHR case *S. and Marper v. United Kingdom*, Applications nos. 30562/04 and 30566/04; and CJEU case *Digital Rights Ireland Ltd, C-293/12*.

<sup>585</sup> Screening proposal, COM (2020) 612 final, p. 12.

<sup>586</sup> Article 2(1), Regulation (EU) 2016/679.

<sup>587</sup> Articles 16 and 17, General Data Protection Regulation. See in this regard EDPS (2020), *Opinion on the New Pact on Migration and Asylum*, cit., § 33.

<sup>588</sup> EPRS, [Asylum Procedures at the Border, European Implementation Assessment](#), November 2020.

<sup>589</sup> Amended Proposal for APR, COM(2020) 611 final, Article 41.

**vulnerability are lacking** in practice,<sup>590</sup> it is to be expected that **this guarantee will not have a positive impact** on the rights of persons with special needs. This is especially so as the provisions of the Screening proposal on debriefing and the outcome of the screening do not in any way refer to identified vulnerabilities or special procedural needs of applicants.<sup>591</sup> As the outcome of the screening determines which procedure is to be applied, the **absence of specific rules on how to deal with persons with special needs** has a negative impact on their rights.

As regards **minors**, the new pact only excludes the application of border procedures to unaccompanied minors and families with minors under 12 years. However, according to the Convention on the Rights of the Child (CRC), a **child is 'every human being below the age of eighteen years'**.<sup>592</sup> The distinction within different categories of minors in the new pact accordingly conflicts with international human rights law on the rights of children. Moreover, the **extended periods of time spent in detention** as a result of the application of pre-entry procedures, as set out above, are in violation of the **rights of the child**. According to the ECtHR in immigration procedures concerning minors, 'the child's extreme vulnerability [...] takes precedence over considerations relating to the status of illegal immigrant'.<sup>593</sup> The Committee on the Rights of the Child has called on states to 'expeditiously and completely cease the detention of children on the basis of their immigration status' and 'adopt alternatives to detention that fulfil the best interests of the child'.<sup>594</sup>

**Children are not excluded from the screening process**, which, as was also set out above, will in most cases imply the use of detention, for a maximum of five or ten days. This is in conflict with the CRC, which determines that 'the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'.<sup>595</sup>

### 6.2.7. Non-discrimination

Some interviewees expressed concerns regarding the fact that the (mandatory) use of the border procedure is **determined by the nationality of the applicant**.<sup>596</sup> The Refugee Convention determines that 'the Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'.<sup>597</sup> Using nationality as a criterion to determine whether entry can or cannot be refused is difficult to justify in light of this rule of international law. This is especially so in times of crisis, **when the nationality of a country the recognition rate of which is less than 70 %** may give rise to refusal of entry. Moreover, as we have set out above, the application of border procedures will, in most cases, imply the use of detention. As such, the use of lists of countries whose nationals can or cannot be detained, on the basis of an EU average recognition rate for these nationalities, is in violation of the requirement that the

<sup>590</sup> See EPRS, [Asylum Procedures at the Border, European Implementation Assessment](#), November 2020.

<sup>591</sup> Screening proposal, COM(2020)612 final, Articles 13 and 14.

<sup>592</sup> Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

<sup>593</sup> ECtHR 19 January 2012, *Popov v. France* App. No. 39472/07 and ECtHR 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. No. 13178/03.

<sup>594</sup> COMMITTEE ON THE RIGHTS OF THE CHILD, REPORT OF THE 2012 DAY OF GENERAL DISCUSSION ON THE RIGHTS OF ALL CHILDREN IN THE CONTEXT OF INTERNATIONAL MIGRATION, paras 78 and 79.

<sup>595</sup> CRC, Article 37.

<sup>596</sup> Migration Pact Impact Assessment interview data, Ecorys, 2021.

<sup>597</sup> 1951 Refugee Convention, Article 3.

necessity of detention is to be assessed individually, and therefore also in violation of the principle of non-discrimination.<sup>598</sup>

While not relevant for pre-entry procedures, we feel it is important to draw attention to the fact that the screening which is provided for **within the territory** in the screening regulation **reverses the burden of proof for immigrants**. Thus, the Screening proposal determines that Member States 'shall apply the screening to persons found within the territory where there is **no indication** that they have crossed an external border to enter the territory of the Member States in an authorised manner'.<sup>599</sup> When formulated in this way, its application may give rise to discriminatory practices, such as **ethnic profiling**.<sup>600</sup>

### 6.2.8. Non-refoulement, effective remedies and the right to remain

Pre-entry procedures have implications for the procedural guarantees available to migrants. Asylum border procedures, in particular, have a **negative impact on the protection of procedural guarantees** of migrants due to the use of detention and short deadlines set.<sup>601</sup> In this regard, the **extension of the period available for the border procedure has a positive impact on the protection of migrants' procedural rights**, seeing that they have **more time to substantiate their claims**.<sup>602</sup> In our discussion below, we will focus on the two main novel elements introduced by the new pact when compared to procedural guarantees in border procedures under current EU law. These concern the so-called **seamless procedures** and limits to the **number of appeals and their suspensive effect**. After this, we also assess the **impact on the right to an effective remedy of the screening procedure**.

#### Non-refoulement in 'seamless' procedures

The joint or simultaneous issuance of a decision rejecting the application for asylum and a return decision which the pact proposes may **negatively impact effective respect for the principle of non-refoulement**.<sup>603</sup> As outlined in Chapter 5, Member States 'shall' issue a return decision that 'respects' the Return Directive if an application is rejected as inadmissible, unfounded or manifestly

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<sup>598</sup> See *a contrario* ECtHR 11 July 2006, *Saadi v UK*, App. No. 13229/03 (Chamber Judgment), para 46: 'other claims of arbitrariness made by the applicant – for example that the detention was arbitrary precisely because its aim was to decide more speedily, rather than for any reason related to the applicant, or because it involved the use of lists of countries whose nationals could or could not be detained at Oakington – are in effect re-statements of the claim that there should be a 'necessity' test for such detention.' As we have set out above, EU law **requires** such a necessity test for detention.

<sup>599</sup> Screening proposal, COM (2020) 612 final, Article 5.

<sup>600</sup> See for example a pending case against the Dutch government, in which it is asserted that the border police select people on the basis of their appearance, skin colour or origin (ethnicity), amongst other things ('the Dutch border police also applies general risk profiles that incorporate ethnicity, such as 'men who walk fast, are well-dressed and who don't 'look Dutch'). See Amnesty International, [PRESS RELEASE: Dutch border police in court for ethnic profiling](#), 26 February 2020. See also ECRE comments on the screening proposal.

<sup>601</sup> Migration Pact Impact Assessment Country research for Spain on the basis of desk research and an interview with the Comisión Española de Ayuda al Refugiado (CEAR), ECORYS, 2021. See also EPRS, [Asylum Procedures at the Border, European Implementation Assessment, Part II](#), legal assessment, November 2020; and Cornelisse, G, Reneman, M., Border procedures in the Commission's New Pact on Migration and Asylum: A case of politics outplaying rationality? *Eur Law J.* 2021; 1– 18.

<sup>602</sup> Migration Pact Impact Assessment Country research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), ECORYS, 2021.

<sup>603</sup> An analysis of data regarding Member States that combine these procedures would be useful but go beyond the scope of this IA.

unfounded with regard to both refugee status and subsidiary protection status, or is implicitly or explicitly withdrawn.<sup>604</sup>

The rejection of an asylum claim under EU asylum law does not necessarily mean that actual return complies with all relevant fundamental rights guarantees. For example, under the Return Directive and Article 19 of the Charter, non-refoulement may require that persons may not be removed where there is a serious risk of grave and irreversible deterioration in the state of health of the third country national concerned.<sup>605</sup>

The new pact integrates the EU *acquis* on asylum and irregular migration by introducing return border procedures in the APR. While it is clear that Member States are under an obligation to respect non-refoulement when acting on the basis of EU law, there is **no justification for the absence of clear and explicit rules on the obligations of Member States with regard to non-refoulement in return procedures**; that is to say, rules that go beyond a mere reference to 'respect' for the Return Directive.<sup>606</sup>

**A mere reference to 'respect for the Return Directive' is especially problematic** as the APR retains the freedom of Member States to choose **not to apply the Returns Directive** to asylum seekers whose application is rejected in a border procedure.<sup>607</sup> **Legal clarity** on how to ensure respect for non-refoulement in seamless procedures on this point is thus particularly compromised in the APR.

Limiting appeals and their suspensive effect, implications for the right to remain

Article 47 of the Charter provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an **effective remedy** before a court. This guarantee is particularly important in order to protect the **principle of non-refoulement**.<sup>608</sup>

In the first place, it has been argued that the **absence of an appeal against the outcome of the screening** is in violation of the right to an effective remedy.<sup>609</sup> While refusal of entry is open to appeal on the basis of the SBC, there are no effective remedies available with regard to the choice of a Member State to apply a border procedure or not. This is in violation of the right to an effective remedy.

As discussed in Chapter 5, when asylum applications in the border procedure are rejected, only **one level of appeal** would be allowed. This is not in violation of the right to an effective remedy.<sup>610</sup> Nonetheless, it may raise proportionality concerns in view of the procedural autonomy of the Member States, as we will set out in the next Chapter.<sup>611</sup>

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<sup>604</sup> Amended Proposal for APR, COM(2020) 611 final, Article 35(a).

<sup>605</sup> C-562/13, *Abdida*, EU:C:2014:2453.

<sup>606</sup> Amended Proposal for APR, COM(2020) 611 final, Article 35a. We do not address the implications of the seamless asylum and return border procedures for **voluntary return**, which EU law requires to be given preference over forced return. Because of the legal ambiguity of the qualification of the stay at external borders, such a discussion would need to go into the significance of voluntariness in this precise context where persons are in a situation of factual confinement.

<sup>607</sup> Amended Proposal for APR, COM(2020) 611 final, Article 41a(8).

<sup>608</sup> C-562/13, *Abdida*, EU:C:2014:2453, para 45, and C-239/14, *Tall*, EU:C:2015:824, para 51.

<sup>609</sup> ECRE, Comments on COM(2020)612.

<sup>610</sup> C-181/16, *Gnandi*, ECLI:EU:C:2018:46.

<sup>611</sup> For an elaboration on this point, see the EPRS, [Substitute Impact Assessment of the Return Directive](#), February 2019.

The **negative impact of the absence of clear rules** in the APR on the obligations of Member States with regard to non-refoulement in border procedures, as discussed above, is exemplified by the proposal to limit the **suspensive effect of appeals** in the border procedure. These proposals do not take due account of the way in which the principle of effective judicial protection and non-refoulement as interpreted by the Court of Justice, would **constrain appeal procedures after the application for asylum is rejected in a border procedure**.

Thus, the new pact proposes that appeals against negative decisions in the asylum border procedure would **lack automatic suspensive effect**. The absence of automatic suspensive effect means that applicants will only have a **right to remain** if a court grants such a right upon their request.<sup>612</sup> They also have a right to remain during the period in which they may request the court to grant them the right to remain.<sup>613</sup>

The APR further stipulates that the effects of a return decision shall be automatically suspended for as long as an applicant has a right to remain or is allowed to remain, thus ensuring 'respect of the principle of *non-refoulement*'.<sup>614</sup> In the SWD, the Commission writes that the lack of automatic suspensive effect means that the person concerned can 'return'.<sup>615</sup> Hence, when an applicant does not have the right to remain, the effects of a return decision are **not** suspended. This also transpires from the provisions in the APR which determine that persons who do not have a right to remain, **may be detained** in order to 'prepare the return or carrying out the removal process.'<sup>1</sup>

However, the **lack of suspensive effect** of the appeal against a decision, the enforcement of which may violate the principle of non-refoulement, is in **violation of Article 47 Charter**. This follows from the case law of the CJEU. The Court has held that 'the lack of suspensory effect of an appeal brought solely against a decision rejecting an application for international protection is, in principle, compatible with the principle of non-refoulement and Article 47 of the Charter, **since the enforcement of such a decision cannot, as such, lead to removal of the third-country national concerned**.' The Court has also ruled that 'an appeal brought against a return decision within the meaning of the Return Directive must, in order to ensure [...] compliance with the requirements arising from the principle of non-refoulement and Article 47 of the Charter, **enable automatic suspensory effect**, since that decision may expose the person concerned to a real risk of being subjected to treatment contrary to Article 18 of the Charter, read in conjunction with Article 33 of the Geneva Convention, or contrary to Article 19(2) of the Charter'.<sup>616</sup>

The Court has clarified that it is not sufficient that the Member States **refrain from enforcing the return decision** until the resolution of the appeal. On the contrary, it is necessary that **all the legal effects of that decision are suspended**.<sup>617</sup> This means that a person **may not be held in detention with a view to removal** during the appeal against the rejection of international protection.<sup>618</sup> Moreover, the person concerned must be entitled to reception conditions on the basis of the Reception Conditions Directive.<sup>619</sup> As outlined above, the provisions in the APR on the right to

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<sup>612</sup> SWD (2020) 207 final, p. 73, and Amended Proposal for APR, COM(2020) 611 final, Article 54.

<sup>613</sup> Amended Proposal for APR, COM(2020) 611 final, Article 54, para 5 under d.

<sup>614</sup> Amended Proposal for APR, COM(2020) 611 final, Explanatory Memorandum, p. 11.

<sup>615</sup> SWD (2020) 207 final, p. 86.

<sup>616</sup> C-181/16, *Gnandi*, ECLI:EU:C:2018:46; *Abdida*, C-562/13, EU:C:2014:2453, paras 52 and 53; and C-239/14, *Tall*, EU:C:2015:824, paras 57 and 58.

<sup>617</sup> C-181/16, *Gnandi*, ECLI:EU:C:2018:46 para 61.

<sup>618</sup> C-181/16, *Gnandi*, ECLI:EU:C:2018:46, para 62.

<sup>619</sup> C-181/16, *Gnandi*, ECLI:EU:C:2018:46, para 63.

remain during appeal in a border procedure **do not guarantee the suspension of the effects of a return decision**.

In addition, when Member States decide **not** to apply the Return Directive in border procedures, the refusal of entry which follows the rejection of the application for international protection may **lead to the removal of applicants**. The automatic suspensive effect of appeals against such decisions then has to be guaranteed, as explained by the case law of the Court of Justice discussed above. This is currently not the case in the APR.

In sum, the **absence of a right to remain** as proposed in the APR during appeal procedures violates the principle of **effective judicial protection** protected by Article 47 Charter and **the principle of non-refoulement** in Article 19 Charter.

#### Right to remain in times of crisis

In cases where a court has not granted a right to remain, **applicants will not be authorised to enter the territory**, even if the appeal has not been decided after the expiry of the maximum period for the border procedure.<sup>620</sup> In times of crisis, these limitations to the right to remain may thus affect all applicants coming from countries with a recognition rate of 75 % or lower.

#### Impact of the screening on the right to an effective remedy

The Commission claims that the screening procedure is essentially aimed at information gathering and 'does not entail any decision affecting the rights of the person concerned',<sup>621</sup> as such it is not covered by the right to an effective remedy under Article 47 of the EU Charter on Fundamental Rights. However, **key decisions on the appropriate procedure to which TCNs concerned shall be referred are taken by using the information collected during the screening**.<sup>622</sup> Given the potential impact of the referral decision, it is surprising to see that **TCNs concerned have no possibility to rebut the representation of the facts included in the de-briefing form**.

### 6.2.9. Monitoring mechanism during screening

During the screening, ensuring **compliance with human rights is left to the domestic law** of the Member States. However, as Member States are implementing EU law during the screening, the Charter is applicable. As such, compliance with fundamental rights during the screening is **fully covered** by EU primary law. Against this background, the **lack of rules** in the screening proposal to ensure conformity with fundamental rights during the screening is not a logical choice. The new pact seems to compensate for the lack of these rules by introducing a **monitoring mechanism** which is to ensure compliance with fundamental rights during the screening. Such a mechanism may have a **positive impact** on fundamental rights.

Nevertheless, observers have pointed out a number of shortcomings of the monitoring mechanism as proposed by the Pact. In the first place, the effectiveness of a set-up according to which **Member States monitor themselves** has been questioned; i.e. who monitors the monitors? Secondly, concerns have been voiced on account of the fact that **no sanctions are foreseen in case of non-compliance**. Thirdly, the monitoring mechanism does not provide for **the monitoring of agencies** when they assist Member States in the screening. Lastly, the monitoring mechanism as proposed cannot address **human rights violations that occur outside of the screening process** at external

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<sup>620</sup> Amended Proposal for APR, COM(2020) 611 final, Recital 40e.

<sup>621</sup> Screening proposal, p. 12.

<sup>622</sup> Screening proposal, p. 7.

borders, such as push-backs, hot returns and mistreatment of migrants, and it is not clear whether these agencies have sufficient capacity and resources under national law to carry out their monitoring adequately.<sup>623</sup>

### 6.2.10. Territorial impact of pre-entry procedures (impact on border regions)

In this Section, we will analyse the impact that the pre-entry procedure envisaged by the new pact may have on the reception infrastructure in the three main countries of arrival of migrants in the EU we selected as case studies.<sup>624</sup> The main research question relates to the **territorial distribution of asylum seekers within Member States of reception**.

One of the main concerns expressed during the interviews carried out in preparation for this study is that the **new pact will further increase the pressure that is already being exerted on some specific border regions**.<sup>625</sup> In particular, the fear is that due to the new pre-entry screening procedure and the mandatory nature of asylum and return border procedures, the number of people held in detention or confined near border areas will increase significantly.

In order to assess the territorial impact of the proposed measures, we will first provide a brief description of the existing reception infrastructure in Greece, Italy and Spain. After this, we will assess **how** we expect the new **pre-entry procedure will impact on the reception system** of the three countries considered.

#### The reception system in Greece

All incoming migrants entering Greece without authorisation are placed in Reception and Identification Centres (RIC), where they temporarily reside until they undergo procedures of reception and identification and to submit application for international protection<sup>626</sup>. All migrants accommodated in RIC are kept in a regime of restriction of their liberty for a maximum period of twenty-five (25) days. At the end of December 2020, there were six functioning RIC, five of them on the Aegean islands and another one located in Fylakio, Orestiada, near the land border with Turkey. The system has a capacity of 13,620 places, the vast majority of which are in the Aegean Islands.<sup>627</sup>

In Greece, most of the asylum seekers falling under the umbrella of the EU-Turkey Statement are kept on the Aegean islands.<sup>628</sup> Only minors and vulnerable asylum seekers are exempted from the

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<sup>623</sup> Anja Radjenovic, Push-backs at the EU's external borders, EPRS, March 2021; Dumbrava C., Screening of third-country nationals at the EU's external borders, EPRS, European Parliament, November 2020 and M. Stefan and R. Cortinovis, [Setting the right priorities: is the new Pact on Migration and Asylum addressing the issue of pushbacks at EU external borders?](#) 2020.

<sup>624</sup> See section 6.1 above.

<sup>625</sup> Migration Pact Impact Assessment Country Research for Spain on the basis of desk research and an interview with the Comisión Española de Ayuda al Refugiado (CEAR), Ecorys, 2021; Migration Pact Impact Assessment Country Research for Germany on the basis of desk research and interviews with the German Federal Ministry of the Interior, the German Red Cross and the Jesuiten Flüchtlingsdienst Deutschland, Ecorys, 2021; Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021.

<sup>626</sup> Hellenic Republic, [Information on Reception and Identification Centers](#).

<sup>627</sup> In particular, the operating reception centres on Aegean Islands were: Chios, 1014 places; Samos, 648 places; Leros, 860 places; and Kos, 816 places. Moria, in Lesbos, is no longer operational after the fire of September 2020, but a new facility with a nominal capacity of 10,000 places has been opened in Kara Tepe (Mavrovouni). As of 31 December 2020 the capacity of Fylakio RIC was 282 places. See ECRE, [Reception and Identification Procedure - Greece](#), Webpage.

<sup>628</sup> Dimitriadi, A., The impact of the EU-Turkey statement on protection and reception: The case of Greece, 2016; Dimitriadi, A., & Sarantaki, A. M., National report on the governance of the asylum reception system in Greece, 2019.

'island procedure' and allowed to travel to the mainland. In spite of the fact that people transferred to a RIC may be subject to a restriction of personal liberty only for a maximum of 25 days (until completion of the identification procedure), their freedom of movement is severely curtailed. Since 2016, thousands of asylum seekers have, in fact, been confined in the Aegean islands in dire conditions.<sup>629</sup>

Asylum seekers or those who enter Greece through other sections of the border (i.e. the land border with Turkey) and vulnerable protection seekers transferred to the mainland from the Aegean Islands after their initial stay in a RIC are accommodated in the various second reception centres throughout the country. Since 2015, the second reception system on the mainland has been expanded mainly through temporary accommodation centres and the UNHCR accommodation scheme. Data available on the capacity of these reception facilities at the end of 2020 suggest that 28,381 places were provided in state-run temporary accommodation centres, and the other 28,148 in the accommodation scheme run by the UNHCR.<sup>630</sup> However, most accommodation facilities are located in remote areas several kilometres away from main urban centres, hospitals, and public services.<sup>631</sup>

### The reception system in Italy

In Italy, the current reception system for asylum seekers is divided into three main segments. First assistance after disembarkation is provided in First Aid and Reception Centres (CPSA), mainly located in the South of the country, where also screening and identification pursuant to the hotspot approach is performed.<sup>632</sup> These facilities have often been the focus of debate, with the Italian Government accused of illegally keeping many migrants in a condition of de-facto detention before letting them enter the territory.<sup>633</sup> This is in particular in the hotspot of Lampedusa, where migrants are often free to exit the facility but not to leave the island. Occasionally, hotspots have also been used as facilities to disperse migrants, and asylum seekers intercepted in the north of the country while attempting to cross the border into France, Switzerland or Austria.<sup>634</sup>

Since 2018, the law also provides for the possibility of detaining certain categories of asylum seekers for the entire duration of the newly established border asylum procedure.<sup>635</sup> However, data suggest that asylum seekers still remain in hotspots for a few days on average<sup>636</sup> before being transferred to

<sup>629</sup> Dimitriadi, Angeliki, *Governing irregular migration at the margins of Europe. The case of hotspots on the Greek islands*, Etnografia e Ricerca Qualitativa, 2017; Pallister-Wilkins, Polly, *Moiras Hotspot. Shelter as a Politically Crafted Materiality of Neglect*, 2020.

<sup>630</sup> See: ECRE, [Types of Accommodation](#) – Greece. Webpage.

<sup>631</sup> Migration Pact Impact Assessment Country Research for Greece on the basis of desk research and interviews with IOM Greece and the Greek Ministry of Migration and Asylum, Ecorys, 2021.

<sup>632</sup> At the end of 2020, four hotspots were operating in Italy. One located in Apulia (Taranto) and the other three in Sicily (Lampedusa, Pozzallo, and Messina), for a total of 1446 places available. See: Governo Italiano, [Centri per l'immigrazione](#). Webpage.

<sup>633</sup> Benvenuti, Marco, *Gli Hotspot come chimera. Una prima fenomenologia dei punti di crisi alla luce del diritto costituzionale*, *Diritto, immigrazione e cittadinanza* (2), 2018; Sciarba, Alessandra, *Categorizing migrants by undermining the right to asylum. The implementation of the hotspot approach in Sicily*, *Etnografia e Ricerca Qualitativa* (1):97-120, 2017; *Garante nazionale dei diritti delle persone detenute e private dalla libertà personale, Rapporto sulle visite nei Centri di identificazione ed espulsione e negli hotspot in Italia*, Roma, 2017.

<sup>634</sup> Tazzioli, Martina, and Glenda Garelli. 2018. 'Containment beyond detention: The hotspot system and disrupted migration movements across Europe.' *Environment and Planning D: Society and Space*.

<sup>635</sup> ECRE, *Country Research: [Border procedure \(border and transit zones\) – Italy](#)*. Webpage.

<sup>636</sup> *Garante nazionale dei diritti delle persone detenute e private dalla libertà personale, Rapporto sulle visite nei Centri di identificazione ed espulsione e negli hotspot in Italia*, Roma, 2017; *Garante nazionale dei diritti delle persone detenute e private dalla libertà personale, Relazione al Parlamento 2019*, Roma, 2019.

first reception centres for asylum seekers (CDA). In these facilities, which are now distributed throughout the national territory,<sup>637</sup> asylum seekers lodge their application and then may ask to be admitted to a second reception centre. Over the years, the Italian Government has tried to expand the network of second reception centres (now called *Sistema di Accoglienza e Integrazione*), also adopting a territorial distribution criterion to avoid concentration in specific areas.<sup>638</sup> Despite this, the reception system has never been able to absorb all incoming asylum seekers. For this reason, many of them continued to be accommodated in first reception centres (CDA) or in the so-called extraordinary reception centres (CAS).<sup>639</sup>

As a consequence of the decrease in the number of incoming migrants, the distribution of asylum seekers in the Italian reception system has improved over time. According to data collected by the NGOs Openpolis and Action Aid Italy, in 2017, the year of maximum expansion of the Italian reception system, 87 per cent of asylum seekers (that is to say 158,940) were accommodated in CDA and CAS, while the remaining 13 % (that is to say 24,741) in the network of second reception centres. In 2020, the percentages were 68 % and 32 % respectively, for a total of 54,364 asylum seekers in CDA and CAS and 25,574 in the network of second reception centres.<sup>640</sup> Between 2016 and 2020, Italy has also managed to distribute asylum seekers equally throughout the national territory, relying in particular on the model of second reception in small centres or apartments, which has often been described as an example of best practice.<sup>641</sup>

## The reception system in Spain

Over the last few years, Spain has implemented a containment strategy largely premised on the confinement of incoming migrants on islands or in the extraterritorial enclaves of Ceuta and Melilla.<sup>642</sup> This strategy is premised on the idea that transferring migrants and asylum seekers on the mainland may represent a pull factor for other migrants.<sup>643</sup>

This controversial deterrence policy has been widely criticized, leading to more than 18 rulings from different Spanish Courts that have declared the limitation of the freedom of movement imposed on migrants and asylum seekers illegal.<sup>644</sup> In spite of this, reports suggest that the Spanish Government continues to keep asylum seekers in the two Spanish enclaves on African territory, where they have to wait for the decision regarding the admissibility of their claim in order to be transferred to the Spanish peninsula and its asylum reception system.<sup>645</sup>

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<sup>637</sup> For a long time, first reception facilities have been mainly concentrated in Southern Italy. At the end of 2020, Italy had 9 CDA, for a total of approximately 4000 places.

<sup>638</sup> Ministero dell'Interno, Roadmap italiana, Roma, 2015.

<sup>639</sup> According to the last [figures](#) provided by the Italian Ministry of Interior, as of June 2020 there were over 5,000 CAS, with a potential capacity of 80,000 places.

<sup>640</sup> Openpolis, [Come funziona l'accoglienza dei migrant in Italia](#), Webpage.

<sup>641</sup> Actionaid, and Openpolis, 'Centri d'Italia. Una mappa dell'accoglienza, 2021; Virzi, Flavio Valerio, La 'seconda' accoglienza, in: La crisi migratoria tra Italia e Unione Europea: diagnosi e prospettive, edited by Mario Savino. Napoli: Editoriale Scientifica, 2017.

<sup>642</sup> Ferrer-Gallardo, Xavier, and Abel Albet-Mas, EU-LimboScapes: Ceuta and the proliferation of migrant detention spaces across the European Union, *European Urban and Regional Studies*, 2016; Fuentes Lara, M. Cristina, La singularidad fronteriza de Ceuta y Melilla, *Revista CIDOB d'Afers Internacionals* (122):241-44, 2019.

<sup>643</sup> Migration Pact Impact Assessment Country Research for Spain on the basis of desk research and an interview with the Comisión Española de Ayuda al Refugiado (CEAR), Ecorys, 2021.

<sup>644</sup> See ECRE, [Country Research: Types of Accommodation – Spain](#), Webpage.

<sup>645</sup> Migrants kept in Ceuta and Melilla are hosted in the two Migrant Temporary Stay Centres (CETI), whose capacity is of 512 places in Ceuta and 782 in Melilla. See ECRE, [Country Research: Types of Accommodation – Spain](#), Webpage.

The same applies to the Canary Islands, where due to the growing number of arrivals recorded since 2018, many challenges were reported in providing adequate reception conditions. In lack of proper reception facilities, different emergency accommodation shelters have been created on an ad-hoc basis. Among these, the largest was the encampment at the dock of Arguineguín (Gran Canaria), where reception to 400 persons was offered until a new emergency reception facility was open in a military site in Barranco Seco (Gran Canaria).<sup>646</sup> Lastly, the Spanish Government has announced an investment plan of EUR 15.8 million to enhance reception offered on the Canary Islands. In parallel, EASO has also offered its support.<sup>647</sup> Yet, reports still signal migrants and asylum seekers left with no reception solution.<sup>648</sup>

Given the practical difficulty of implementing a strict confinement policy on islands and other extraterritorial enclaves and the parallel increase in the number of migrants reaching the shores of Andalusia, starting from 2018, the Spanish Government has established new facilities to provide reception to incoming migrants and asylum seekers.

Immediately after arrival, migrants are placed in the so-called Centres for the Temporary Assistance of Foreigners (CATE). These are State-run facilities where incoming migrants can be detained for up to 72 hours until identification.<sup>649</sup> After identification, migrants wishing to seek asylum may be accommodated in the Centres for Emergency Assistance and Referral (Centros de Atención de Emergencia y Derivación, CAED), where they receive support and are referred to the asylum authorities. According to available information, CAED is run by NGOs, primarily but not exclusively by the Red Cross.<sup>650</sup>

Concerns have been raised with regard to the absence of a proper legal framework and overall lack of transparency on the actual functioning of Spanish first reception centres.<sup>651</sup> According to the Spanish Ombudsman (Defensor del Pueblo), CATEs are essentially considered as 'extensions' National Police stations,<sup>652</sup> while CAED functioning should be inspired by a humanitarian logic rather than security and law enforcement criteria.<sup>653</sup> Overall, the first reception system in Spain has a capacity of approximately 1 000 places in CATE and 1 500 placed in CAED.<sup>654</sup>

The reception system for asylum seekers on the mainland is fragmented and still underdeveloped. Spain has four first State-run Refugee Reception Centres (two in Madrid, one in Seville and another in Valencia) (Centros de acogida de refugiados, CAR) for a total of 416 places, plus a number of scattered reception centres managed by local administrations, charities and social entities. Similar

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<sup>646</sup> ECRE, [Country Research: Types of Accommodation – Spain](#), Webpage.

<sup>647</sup> EASO, [Spanish State Secretary for Migration visits EASO following launch of new operation in the country](#), 1 February 2021.

<sup>648</sup> ECRE, [County Report: Conditions in reception facilities](#), Webpage.

<sup>649</sup> Barbero, Iker, Los Centros de Atención Temporal de Extranjeros como nuevo modelo de gestión migratorio: Situación actual, (des)regulación jurídica y mecanismos de control de derechos y garantías, *Derechos y Libertades*, volumen 45, 2021.

<sup>650</sup> Boza Martínez D., Pérez Medina D., *New Migrant Detention Strategies in Spain: Short-term Assistance Centres and Internment Centres for Foreign Nationals*, Paix et Sécurité Internationales, volume 7, 2019.

<sup>651</sup> Boza Martínez D., Pérez Medina D., *New Migrant Detention Strategies in Spain: Short-term Assistance Centres and Internment Centres for Foreign Nationals*, Paix et Sécurité Internationales, volume 7, 2019.

<sup>652</sup> Defensor del Pueblo, Informe anual 2019, 2019. In 2020, there were 4 operating CATE (in Montril, San Roque, Almería and Málaga), for a total capacity of approximately 1000 places.

<sup>653</sup> Boza Martínez D., Pérez Medina D., *New Migrant Detention Strategies in Spain: Short-term Assistance Centres and Internment Centres for Foreign Nationals*, Paix et Sécurité Internationales, volume 7, 2019.

<sup>654</sup> Ibid.

to what happens in Italy, the reception of asylum seekers on the mainland is inspired by the aim of distributing them throughout the territory.<sup>655</sup>

The potential impact of the new pre-entry procedure on frontline Member States

From the analysis we have carried out, it is clear that **the proposals contained in the Pact will further strengthen a trend already underway**, especially in Spain and Greece, where asylum seekers may be confined in specific border regions pending the assessment of the admissibility of their application, or in some cases also the entire duration of the procedure. In particular, the new pre-entry stage envisaged by the new pact may require Member States to increase the accommodation capacity of existing reception facilities in border regions.

Table 6.0-1 below presents the **estimates of the accommodation capacity needed for pre-entry screening and border asylum procedures**. The estimation has been made by multiplying the number of places for the expected turnover in accommodation facilities, depending on the maximum duration of the related procedure in normal times and crisis scenarios. In order to assess the potential impact of the new pact on the existing reception infrastructure in Greece, Italy and Spain, we consider here **two different migration scenarios** as illustrated by Table 6.0-2 and Table 6.0-3.

Table 6.0-1 – Estimated accommodation capacity needed for pre-entry screening and border asylum procedures

Estimated accommodation capacity needed for pre-entry screening				Estimated accommodation capacity needed for border asylum procedures			
Normal times							
Maximum duration of the procedure	Yearly turnover	Places	Yearly capacity	Maximum duration of the procedure	Yearly turnover	Places	Yearly capacity
5 days	73	1500	109500	84 days/12 weeks	4,3	10000	43452
5 days	73	2000	146000	84 days/12 weeks	4,3	15000	65179
5 days	73	2500	182500	84 days/12 weeks	4,3	20000	86905
Crisis scenario							
Maximum duration of the procedure	Yearly turnover	Places	Yearly capacity	Maximum duration of the procedure	Yearly turnover	Places	Yearly capacity
10 days	36,5	1500	54750	140 days/20 weeks	2,6	15000	39107
10 days	36,5	3000	109500	140 days/20 weeks	2,6	25000	65179
10 days	36,5	5000	182500	140 days/20 weeks	2,6	30000	78214

<sup>655</sup> ECRE. [Country Research: Types of Accommodation – Spain](#). Webpage.

Source: Authors' elaboration on Eurostat data.

Table 6.0-2 – Unauthorised arrivals

Unauthorised arrivals in Italy <sup>656</sup>			
2015	153842	2018	23370
2016	181436	2019	11471
2017	119369	2020	34154
<b>Average 2015-2017</b>	<b>151549</b>	<b>Average 2018-2020</b>	<b>22998</b>
Unauthorised arrivals in Spain <sup>657</sup>			
2015	16918	2018	64298
2016	14605	2019	32513
2017	27834	2020	41861
<b>Average 2015-2017</b>	<b>19786</b>	<b>Average 2018-2020</b>	<b>46224</b>
Unauthorised arrivals in Greece <sup>658</sup>			
2015	877426	2018	50508
2016	179911	2019	74613
2017	35115	2020	15696
<b>Average 2015-2017</b>	<b>364151</b>	<b>Average 2018-2020</b>	<b>46939</b>

Source: Authors' elaboration on data. For references see Footnotes.

Table 6.0-3 – Asylum applications

Asylum applications in Greece			
2015	13205	2017	66975
2016	51110	2018	77285
2017	58660	2019	40560
<b>Average 2015-2017</b>	<b>40992</b>	<b>Average 2018-2020</b>	<b>61607</b>
Asylum applications in Italy			
2015	83540	2018	59950
2016	122960	2019	43775
2017	128855	2020	26550
<b>Average 2015-2017</b>	<b>111785</b>	<b>Average 2018-2020</b>	<b>43425</b>
Asylum applications in Spain			
2015	14785	2018	54060
2016	15755	2019	117815
2017	36610	2020	88540

<sup>656</sup> Italian Interior Ministry: [Cruscotto statistic giotnaliero](#). Webpage.

<sup>657</sup> [Spanish Interior Ministry](#).

<sup>658</sup> Hellenic Police, [Ministry of Public Order and Citizen Protection](#) (For 2018-2020) and [UNHCR](#).

<b>Average 2015-2017</b>	<b>22383</b>	<b>Average 2018-2020</b>	<b>86805</b>
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Source: Eurostat.

Some **methodological challenges** must be recalled here, in particular with regard to the poor quality of the data available on the existing reception infrastructure in the three countries (see Table 6.0-4 for an overview). For instance, in Greece, RICs function as both hotspots and reception centres for migrants subjected to the 'island procedure'. In theory, with the implementation of the new pact, they could be used for both the pre-entry screening and the border asylum procedure. This makes it more difficult to assess whether their current accommodation capacity is adequate for an effective implementation of the whole pre-entry stage as designed by the new pact. In turn, Spain is equipped only with facilities where to offer first aid and screen incoming migrants, but not with a well-structured reception infrastructure for asylum seekers. From the information available, it is not entirely clear whether the existing first reception facilities also accommodate asylum seekers after the completion of the screening stage upon arrival.

Table 6.0-4 – Existing reception infrastructures

Reception infrastructure in frontline Member States as of December 2020			
Typology	Country	Facility denomination	Number of places available
<b>First reception</b> Usually in proximity of the border	Greece	Reception and Identification Centres [hotspots]	13620
	Italy	First Aid and Reception Centres (CPSA) [hotspots]	1400
		First reception centres for asylum seekers (CDA)	9000
	Spain	Migrant Temporary Stay Centres (CETI)	1294
		Centres for the Temporary Assistance of Foreigners (CATE)	1000
		Centres for Emergency Assistance and Referral (CAED)	1500
<b>Second reception</b> Reception facilities dispersed throughout the territory	Greece	UNHCR accommodation scheme	28381
		State-run temporary accommodation centres	28148
	Italy	Extraordinary reception centres (CAS)	80000
		Second reception centres (Sistema di Accoglienza e Integrazione)	25000
	Spain	Centros de acogida de refugiados (CAR)	416
		Reception centres managed by local administrations, charities and social entities	N/A

Source: Authors' elaboration on sources referred to in the country research.

This said it is possible to sketch some estimates by taking Italy as a case study. Italy has 1440 places in hotspot facilities for the screening of incoming migrants. After screening, those declaring their intention to lodge an application for international protection are moved to First reception centres for asylum seekers (CDA). Assuming that existing hotspot facilities will be used for implementing the new pre-entry screening procedure and that this is completed within the maximum deadline of 5 days, the system would reach the capacity for accommodating about 100,000 migrants per year. In a migration scenario similar to the 2018-2020 period (see Table 6.2), the current infrastructure should not be expanded significantly. Yet, the structural features of the existing hotspots would need to be revised, as they are not currently designed as closed secured facilities. On the contrary, in a migration scenario similar to that of the 2015-2017 period (see Table 6.0-2) it is likely that the time to complete the screening would reach 10 days, thus reducing turnover. As a consequence, Italy should expand the capacity of its first reception system to at least 4,500 places (see Table 6.0-1).

The pact also introduces a mandatory border procedure that requires Member States to keep at the border asylum seekers subject to it. By cross-referencing data on asylum applications with the EU recognition rate for 2020, we tried to estimate the number of asylum seekers that would likely be

subject to the border procedure in the two different migration scenarios (see Table 6.0-6).<sup>659</sup> According to our estimation, 51 % of asylum seekers would be subject to the border procedure in a scenario similar to that of the 2015-2017 period, this percentage decreasing to 42,8% in a 2018-2020 scenario.

Table 6.0-5 – Estimated number of asylum seekers that would likely be subject to the border procedure

Estimated number of asylum seekers subject to the border procedure			
	Number of asylum applications 2015-2017 (yearly average)	Number of AS likely to be subject to the border procedure	%
Greece	40992	10388	25,3 %
Italy	111785	72592	64,9 %
Spain	22383	6952	31,1 %
<b>Total</b>	<b>175160</b>	<b>89932</b>	<b>51,3 %</b>
	Number of asylum applications 2018-2020 (yearly average)	Number of AS likely to be subject to the border procedure	%
Greece	61607	14562	23,6 %
Italy	43425	28407	65,4 %
Spain	86805	39233	45,2 %
<b>Total</b>	<b>191837</b>	<b>82202</b>	<b>42,8 %</b>

Source: Authors' elaboration on Eurostat data.

What emerges from our analysis is that **the implementation of the pact would not change the current scenario in Greece for the worse**, as thousands of asylum seekers are already kept at the border under existing rules. **The new pact would rather create a 'Moria like' scenario in other countries**, even if the situation may vary significantly depending on the characteristics of the migration flow.

If we consider **Spain**, data on the 2018-2020 scenario, during which a significant increase in asylum requests has been recorded compared to the 2015-2017 period (see Table 6.0-6), suggest that with the main nationalities of asylum seekers unchanged, **the impact of the new border procedure would likely be felt mostly at international airports.**<sup>660</sup> But of course, if the number of arrivals by sea further increases, the impact of the new per-entry procedure will also be felt on the reception

<sup>659</sup> This estimation presents of course many methodological problems. First, it does not consider age and vulnerability, meaning that the number of asylum seekers subject to the border procedure may be overestimated. Second, we consider here only the first 20 nationalities for number of first instance asylum requests lodged in given year, thus excluding from our estimation thousands of asylum seekers. This may lead to an underestimation of the number of asylum seekers likely to be subject to the border procedure each year.

<sup>660</sup> For more detailed data on the estimated number of asylum seekers likely to be subject to the border procedure per nationality, see the tables included in the annex of this Study. It must be added here that, in light of the lack of reliable data, we are not in the condition of estimating the potential impact of the asylum border procedure on reception infrastructures existing at main international airports.

infrastructure at main disembarkation points (Ceuta and Melilla, Canary Islands, Andalusian coast), where Spain should provide the reception capacity which is currently lacking.

**Italy** is the country in which the introduction of the new mandatory border procedure is likely to have the most profound impact. In a 2015-2017 like scenario (see Table 6.0-6), Italy **should triple the accommodation capacity of its first reception centres**, while in a 2018-2020 like scenario, the country's **first reception system** would at least need to be totally **redesigned**. In particular, first reception centres for asylum seekers will be converted in closed centres where to accommodate individuals whose entry into the territory should be prevented.

Furthermore, the new reception facilities would be concentrated in the border areas, and this is likely to have **repercussions on the reception system as a whole**. In particular, an approach of this type is in clear contradiction with the attempts pursued in Italy to distribute asylum seekers throughout the national territory in a more balanced way, privileging reception offered in small accommodation facilities. Italy could, in principle, use its vast network of extraordinary reception facilities, given that the amended Asylum Procedure Regulation allows asylum seekers subject to the border procedure to be accommodated elsewhere if facilities near the border are under stress. Yet, it must be recalled that the structural design of extraordinary reception centres in Italy is such that they are not suitable for accommodating individuals kept in a condition of *de facto* detention.<sup>661</sup>

These findings are consistent with the opinion of many of the governmental and non-governmental experts interviewed in preparation for this study,<sup>662</sup> according to which the new pact is likely to encourage the creation of a **territorially unbalanced reception system**, built on a number of large reception (or detention) facilities concentrated in some strategic regions in the political geography of migration containment at the EU borders. Regions such as the Aegean islands, the area of Evros, Ceuta and Melilla, the Canary Islands, Lampedusa and some areas in Sicily, Calabria and Apulia, which have traditionally been at the forefront of first reception, could therefore see an expansion of the already extensive migration management infrastructure they host on their territory.

Moreover, given the logistical complications that creating large reception infrastructures entails, especially when there is a need to prevent asylum seekers from leaving the facility where they are accommodated, **establishing reception facilities in remote places or military premises is likely to be further incentivised**. The underlying logic of such a geography of asylum reception would be to avoid that the establishment of accommodation facilities for asylum seekers has an excessive impact on local communities. However, if that were the case, this would be at the expense of asylum seekers, who would be increasingly segregated in marginalised or otherwise poorly accessible locations.

### 6.2.11. Economic impact of pre-entry procedures

The new pact introduces many changes in the current screening, asylum and return procedures that have substantial economic impacts. Some changes in pre-entry procedures also affect the likelihood of secondary movements and Dublin take-back transfers and are therefore discussed in

<sup>661</sup> In the vast majority of cases, accommodation is offered in normal apartments (see: Actionaid, and Openpolis. 2021. 'Centri d'Italia. Una mappa dell'accoglienza.').

<sup>662</sup> Migration Pact Impact Assessment Country Research for Greece on the basis of desk research and interviews with IOM Greece and the Greek Ministry of Migration and Asylum, Ecorys, 2021; Migration Pact Impact Assessment Country Research for Spain on the basis of desk research and an interview with the Comisión Española de Ayuda al Refugiado (CEAR), Ecorys, 2021; Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021.

this section even though Dublin procedures are not part of pre-entry procedures. An economic impact assessment is different from the legal assessments in the previous sections in the sense that an economic assessment includes **no judgement of already prevalent shortcomings**.

For example, if deadlines of procedures are reduced, the economic assessment only considers the financial implications of the reduction of the deadlines and not whether the deadlines were already too tight in the first place. The reason for doing so is that the Commission's Impact Assessment Guidelines prescribe a comparison with a baseline,<sup>663</sup> which consists of a scenario in which EU policy does not change. From a practical viewpoint, any costs and benefits that are presented are likely interpreted as additional **costs and benefits compared to the baseline**, and thus it makes sense to only present the additional values.

The new measures in the new pact that are assessed to have the largest economic impacts include:

- The introduction of a new EU definition of 'safe' countries and the non-entry fiction for applicants from these countries (under the mandatory border procedure). Among its effects with substantial changes in costs and benefits are the need to replace open reception centres with closed centres to comply with the non-entry fiction and the reduced likelihood of secondary movements during the mandatory border procedures;
- The requirement of a debriefing form that describes amongst others the route and the people facilitating the move to Europe;
- The requirement to collect biometric data during the screening procedure;
- Minimum requirements for reception facilities, causing direct costs where these facilities are currently 'inadequate' and potentially lifting the current ban to transfer asylum seekers back to Greece;
- Reduced duration of the border procedures by limiting avenues for appeal.

A change in the new pact with uncertain but potentially significant economic impacts is the cost of **independent monitoring of the human rights** of asylum seekers because the new pact provides that an EU agency will lay down the minimum requirements. **EASO** also requires administrative data, but in principle, not more than currently is the case. For example, data on the number of absconding asylum seekers could be useful but is neither currently required nor will be required by the new pact.

It is also notable that the new measures in the new pact relating to pre-screening procedures do not affect the inflow of asylum seekers because the pre-screening procedures start with the arrival of asylum seekers. Also, the grounds for deciding on asylum applications do not change for most asylum seekers: whether it would be safe for asylum seekers to return to their country of origin remains decided on an individual basis, and the grounds to deny entry (public security and misleading or false information) remain practically the same. Thus, the new pact does not directly affect either the **inflow** or the **rate of return** of asylum seekers.

The new pact does nominate Frontex as the agency to coordinate cooperation with third countries, and this is discussed in a further section, but no information could be collected on its potential effects, neither through desk research nor through interviews. For this reason, the impacts of the new pact itself on third countries, such as brain drain and remittances to families in the home country, are not assessed to be significant.

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<sup>663</sup> European Commission, [Better Regulation Toolbox 19](#).

## Debriefing form

The new pact introduces a new requirement to prepare a **debriefing form**. It should, amongst others, contain information about “*routes travelled ...*” (Article 13(d) of the proposed Screening Regulation) and “*assistance provided by a person or criminal organisation in relation to unauthorised crossing of the border, and any related information in cases of suspected smuggling*” (Article 13(e)). The only follow-up that the proposed Screening Regulation requires is sending it to national authorities responsible for the asylum procedure and pointing out which information may be useful to decide on the appropriate procedure to follow (Article 14(2)). In an interview, Frontex has pointed out that the information on travel routes and persons assisting migrants would help Frontex deploy its staff and advise Member States effectively, but the benefits of this could not be quantified. Collecting the information on travel routes and persons assisting migrants will likely require the assistance of interpreters, which would make this requirement relatively costly (estimated at about EUR 130 million at the EU level). These costs are mostly incurred by countries where asylum seekers arrive for the first time, namely the frontline Member States and preferred destination countries (see table below and Annex E.1 for the calculations). However, the benefits of data on travel routes and persons assisting migrants are less clear, given that the information only needs to be shared with authorities responsible for the asylum procedure.

Table 6.0-6 – Estimated costs of the debriefing form (per normal year)

Group of asylum seekers	Total	FL	BR	PD	OC
Total costs debriefing form (in EUR mln)	130	40	3	80	4
Per inhabitant (in EUR)	0.30	0.30	0.10	0.40	0.0

FL, BR, PD, OC: FL = 'frontline' Member States (Greece, Italy, Spain), BR = 'Balkan Route' countries (Bulgaria, Croatia, Slovenia, Hungary, Austria), PD = 'Preferred Destination' countries (Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Netherlands, Sweden), OC = Other (less affected) Member States (Cyprus, Czech Republic, Estonia, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia).

Sources: Eurostat (nr asylum seekers), estimate (costs).

## Collecting biometric data

After arriving, asylum seekers are first screened to identify them, and then checked whether they pose a security risk and their health status is checked as well. Most of the requirements in the new pact are not new. However, the new pact changes the circumstances in which **biometric data** needs to be collected. While the current Eurodac regulation requires the collection of fingerprints, the new pact is more stringent. It requires the collection of biometric data **within 5 days** after arrival, during the initial screening. It also requires to have facilities to collect biometric data **at the border**. These provisions are meant to ensure an improved and early collection of biometric data. This requires mostly additional IT investments to exchange the biometric data via Eurodac. The investments include ensuring data privacy. In particular, data may only be shared with third countries under certain conditions (both in the new pact and in current legislation). These investments are largely one-off costs for each country and depend little on the number of asylum seekers.

The most significant effect of collecting biometric data is that secondary movers who illegally move to another EU Member State are easier to identify. This also means that the Member State responsible for the asylum seeker is easier to determine. In addition, a 'hit' in Eurodac counts as proof and makes it more difficult for other Member States to reject a request to take back the asylum seeker. Thus, the biometric data **help enforce rules on responsibility attribution for asylum seekers**. This has the further implication that costs of asylum seekers shift from preferred destination countries to frontline Member States (see table below and Annex E for the calculations).

Table 6.0-7 – Estimated change in cost due to collection of biometric data (per normal year)

Item	Total	FL	BR	PD	OC
Total change in costs (in EUR mln)	44	68	4	-43	15
Per inhabitant (in EUR)	0.10	0.60	0.10	-0.20	0.20

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table

Sources: Eurostat (nr asylum seekers), estimate (costs).

## EU definition of countries with a low recognition rate

During the screening procedure, authorities also determine whether an asylum seeker originates from a country with a low recognition rate. This is currently voluntary under national law and will become a requirement under the new pact. The new pact provides that asylum seekers from countries with a recognition rate of less than 20% (fewer than 20% of the applications are successful) must enter the **mandatory border procedure**. Although not explicitly stated, it is implicitly clear that the recognition rate for determining whether the border procedure is mandatory must be determined at the EU level. Based on Eurostat data and using this new 20% criterion, the ten 'safe' countries with the largest numbers of asylum seekers at EU level in 2019 were from various parts of the world (see table below). In 2019, about 230 000 out of the 700,000 asylum seekers, or 33%, originated from countries with a less than 20% recognition rate and would have needed to be assigned to the border procedure. The percentage of applicants from countries with a less than 20% recognition rate is higher in frontline Member States Greece, Italy and Spain (42% combined) and lower in preferred destination countries in the northwest of the EU (28%).

Table 6.0-8 – Asylum seekers from 'safe' countries using the 20% criterion in 2019

	Total	FL	BR	PD	OC
Total asylum seekers	700,000	240,000	21,000	410,000	29,000
No. from safe countries	232,000	100,000	6,000	116,000	10,000
% from safe countries	33 %	42 %	27 %	28 %	35 %

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table.

Source: Eurostat.

Member States currently use different definitions of **safe countries** in their national legislation. Among the countries with a recognition rate of less than 20%, we selected the ten countries from which the highest numbers of applicants arrived in the EU in 2019. We then checked which Member States classify those countries as safe, in which case asylum applicants from those countries are likely subject to the currently voluntary border procedure or an accelerated procedure. Germany<sup>664</sup> and Sweden<sup>665</sup> currently define only one or two countries out of this EU top ten as safe in national legislation (Table 6.0.9). Spanish legislation does not define safe countries at all. However, a guideline of the Spanish national border guards considers Algeria and Morocco as 'safe' countries,

<sup>664</sup> Asylum in Europe, [Country report Germany: Safe country of origin](#), 2020.

<sup>665</sup> Migrationsverket, [List of safe countries of origin](#), 25 May 2021.

although this concept is reportedly rarely used.<sup>666</sup> In Greece<sup>667</sup>, Italy<sup>668</sup> and the Netherlands,<sup>669</sup> five or six countries out of the EU top ten are currently considered 'safe'. This shows that definitions of 'safe' countries differ between Member States, but the new pact would generally broaden the definition of safe countries compared to current national legislation. An exception is **Greece** which defines Turkey as a safe third country for asylum seekers originating from Afghanistan, Bangladesh, Pakistan, Somalia and Syria.<sup>670</sup> Pakistan would (with a small margin) be classified as a 'safe' country in the new pact, but the other countries would be 'unsafe' countries from which in 2019 respectively, 68 % (Afghanistan), 22 % (Bangladesh), 54 % (Somalia) and 100 % (Syria) of the applicants were admitted to the EU.

Table 6.0-9 – Ten countries from which less than 20 % of the asylum seekers were admitted in 2019, with the largest numbers of applicants

Country of origin	Asylum seekers (at EU level)	Percentage (%) recognized (at EU level)	Currently 'safe' country in...					
			DE	ES	GR	IT	NL	SE
Colombia	32,000	1 %	No	No	No	No	No	No
Pakistan	29,000	19.7 %	No	No	Yes/No	No	No	No
Georgia	22,000	5 %	No	No	Yes	No	Yes	Yes
Albania	20,000	9 %	Yes	No	Yes	Yes	Yes	Yes
Algeria	10,000	6 %	No	Yes/No	Yes	Yes	Yes	No
Morocco	10,000	10 %	No	Yes/No	Yes	Yes	Yes	No
Ukraine	10,000	15 %	No	No	Yes	Yes	Yes	No
Honduras	7,000	6 %	No	No	No	No	No	No
Peru	7,000	3 %	No	No	No	No	No	No
Nicaragua	7,000	5 %	No	No	No	No	No	No

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table.

Source: Eurostat (quantitative data), desk research (qualitative data).

It should be noted that the definition of a safe country does not imply that all asylum seekers from that country will be rejected. Each application needs to be decided individually. Persons from certain minorities may be in danger in countries defined as safe or in countries with a low recognition rate. The new pact provides they may not be returned to such countries. The concept of countries with a low recognition rate in the new pact only implies that asylum seekers from those countries should,

<sup>666</sup> Asylum in Europe, [Country report Spain: Safe country of origin](#), 2021.

<sup>667</sup> Asylum in Europe, [Country report Greece: Safe country of origin](#), 2021.

<sup>668</sup> Reliefweb, [Italy: List of 13 Safe Countries of Origin to Boost Return Policies](#), 2019.

<sup>669</sup> Government.nl, [Dutch list of safe countries of origin](#).

<sup>670</sup> Asylum in Europe, [Country report Greece: Safe third country](#), 2021.

in principle, be assigned to the mandatory border procedure, except unaccompanied minors (about 15,000 per year at the EU level) and **families with children under 12 years**. No data is available on the number of asylum seekers from a family with children under 12 years. The closest indicator of the numbers involved are Eurostat data on first-time applicants below age 14 (see table below).

Table 6.0-10 – Number of first-time applicants below age 14 in 2019

Country of origin	Total	FL	BR	PD	OC
'Safe' countries	55,600	19,800	1,100	34,200	400
Not 'safe' countries	99,000	19,500	4,600	72,100	2,800
Total	157,600	39,300	5,700	109,200	3,200

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table. Some numbers may not add up due to rounding issues.

Source: Eurostat.

Assuming a 'standard' family of two parents and two children, the number of asylum seekers in families with children under 12 years is approximated with twice the number of first-time applicants below age 14.<sup>671</sup> Calculating this approximation of asylum seekers in these families from safe countries and subtracting this from the total number of asylum seekers from safe countries shows that the exemption of families with children under 12 years **halves** the number of asylum seekers that enter the mandatory border procedure at the EU level (see table below).

Table 6.0-11 – Estimated number of asylum seekers that would enter the mandatory border procedure

Group of asylum seekers	Total	FL	BR	PD	OC
From 'safe' countries	232,000	100,000	6,000	116,000	10,000
... of which in families with children below age 14	110,000	40,000	2,000	68,000	1,000
Total	122,000	60,000	4,000	48,000	9,000

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table

Source: Eurostat 2019 data, own calculations.

## Non-entry fiction

The new pact will newly provide that all asylum seekers from countries with a less than 20% recognition rate must enter the mandatory border procedure. A key aspect of this border procedure will be the non-entry fiction: the asylum seekers are denied entry to the EU. In practice, compliance with the non-entry fiction will require some form of detention in closed reception centres. The non-entry fiction should **reduce the risk of secondary movements (pending the application decision, and in case of a negative decision, before they are returned to the country of origin)**. It is less likely that the non-entry fiction would also affect the rate of return to the country of origin or to another third country. The successful return requires the cooperation of both the asylum

<sup>671</sup> The number of 15,000 unaccompanied minors is ignored because the overlap with children below age 12 is unknown and because their number is comparatively small.

seeker and the country of origin. The non-entry fiction does not affect these two factors. The non-entry fiction means that the possibility of **absconding is limited only during the border procedure**. After the border procedure ends, the rejected asylum seekers are not likely to be detained forever: this is currently not the case and would also go against human rights principles. Hence the risk that rejected asylum seekers stay in the EU for long periods remains similar if they are not successfully returned during the return border procedure.

An observation that the UK both has higher detention rates of asylum seekers ordered to return than average in the EU<sup>672</sup> and a higher than average successful return rate according to Eurostat data might suggest a causal link, but the empirical basis is weak. However, the new pact does not provide rules for the situation that someone ordered to return does not actually return. Therefore, based on human rights principles and recent empirical data, it is **assumed that rejected asylum seekers are not detained very long** if they could not be returned, and thus have an opportunity to abscond and avoid a forced return, and/or to move to another country.

Most reception centres are currently open, as is evident from data on Greece, Italy, and Spain discussed in the territorial impact assessment in the previous section and as is mentioned by the interviewees (see Annex). **Transforming or replacing open centres** costs certain investments, and closed centres need to be guarded. The ratio of staff in closed reception centres to asylum seekers is 1:2 in the Netherlands. One reason for this high ratio is that guards not only need to guard the reception area but also to guard asylum seekers during travels to courts and back. For the closed reception itself, it is important to note that it need not be a prison. A perimeter wall with barbed wire may suffice for asylum seekers who do not pose a security threat. It is also assumed that the closed reception centre includes a (small) supermarket and that asylum seekers can prepare their own meals. This will save huge costs in delivering prepared food. Depending on whether construction of closed reception centres only requires adjustments (e.g. building a perimeter wall and a guardhouse) or whether closed centres need to be newly built, and assuming that a reception centre lasts 30 years, the cost of closed reception centres are estimated to vary between EUR 60 and 90 million per year at EU-level (see table below and Annex E1 for the calculations).

Table 6.0-12 – Estimated cost of constructing and guarding closed reception centres for asylum seekers in the mandatory border procedure (per normal year)

Item	Total	FL	BR	PD	OC
Total costs closed centers (in EUR mln)	60-90	7-11	0	50-70	6-9
Per inhabitant (in EUR)	0.13-0.20	0.06-0.09	0.00-0.00	0.23-0.35	0.06-0.09

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table

Sources: Eurostat (nr applicants, first entry, population), national data (capacity), desk research (costs).

As noted earlier above, a major effect of the non-entry fiction is that asylum seekers in the mandatory border procedures will have a lower possibility to move to another EU country pending the asylum border procedure and the subsequent border return procedure. This **saves costs on take-back requests and transfers**. It also means that preferred destination countries have fewer costs caused by secondary movers during the time they stay in those countries. However, given the collection of biometric data, it is assumed that secondary movers are 100% effectively identified

<sup>672</sup> See Fasani et al., [Lift the Ban? Initial Employment Restrictions and Refugee Labour Market Outcomes](#), IZA Discussion Paper No. 13149, 2020.

and immediately taken back by the responsible country. Therefore the assessment ignores the shift of costs during the assumed very short stays from the responsible country to the country to which migrants move. This reduced number of secondary movements is estimated to save EUR 30 million per year at the EU level, which is mostly achieved in preferred destination countries (see table below and Annex E1 for the calculations).

Table 6.0-13 – Estimated benefits of a reduced number of Dublin take-back procedures due to the no-entry provision (per normal year)

Item	Total	FL	BR	PD	OC
Total saved costs on Dublin procedures (in EUR mln)	21	3	0	18	0
Per inhabitant (in EUR)	0.05	0.03	0.00	0.09	0.00

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table

Sources: Eurostat (nr applicants, returns), desk research (costs).

### Minimum accommodation requirements

The new pact newly provides that accommodation of asylum seekers must meet certain minimum requirements which are to be laid down by an EU agency. This is expected to have positive effects on (mental) health, but this benefit could not be measured. Improving **accommodation requirements** where needed naturally involves costs, either to upgrade existing reception centres or to demolish and replace them. A side effect is that this requirement might increase the number of **take-back transfers to Greece**, which are banned by the European Court of Justice.<sup>673</sup> Currently, despite a number of around 12,700 outgoing transfer requests to Greece in 2019, only about 30 asylum seekers are successfully transferred back to that country.<sup>674</sup>

Despite the absence of what 'adequate reception conditions' mean, the current ban on transfers to Greece is a reason to assume that all reception centres in that country are currently inadequate. The 2016 European Fundamental Rights Agency report<sup>675</sup> indicates that in Hungary, asylum seekers are automatically placed in transit zones 'with limited access to reception conditions'. It also reports that 'hotspots' where asylum seekers are screened and 'pre-reception' facilities in Belgium and France are generally inadequate and that emergency shelters are not always adequate, including, for example, in Germany. Emergency accommodations normally concern only a minority of asylum seekers. Sweden is mentioned as a country with generally adequate housing. Based on these assessments, the following assumptions are made:

- In Greece and Hungary, all facilities are inadequate;
- In Sweden, all facilities are adequate;
- In other countries, reception facilities for 10 % of the asylum seekers are inadequate.

<sup>673</sup> CJEU Court cases C-411/10 and C-493/10, <https://www.asylumlawdatabase.eu/en/content/cjeu-c-411-10-and-c-493-10-joined-cases-ns-v-united-kingdom-and-me-v-ireland>.

<sup>674</sup> See Aida (2020), The implementation of the Dublin III Regulation in 2019 and during COVID-19, [https://asylumineurope.org/wp-content/uploads/2020/11/aida\\_dublin\\_update\\_2019-2020.pdf](https://asylumineurope.org/wp-content/uploads/2020/11/aida_dublin_update_2019-2020.pdf).

<sup>675</sup> European Union Agency for Fundamental Rights (2016), Fundamental Rights report 2016, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2016-fundamental-rights-report-2016-2\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-fundamental-rights-report-2016-2_en.pdf).

**Assuming full compliance** with the minimum accommodation standards, and assuming that a reception centre last 30 years, the cost of this requirement is assessed to vary between EUR 160 and 230 million per normal year and borne mostly by the frontline Member States (see table below and Annex E1 for the calculations).

Table 6.0-14 – Estimated costs of upgrading existing reception facilities to meet minimum accommodation requirements (per normal year)

Item	Total	FL	BR	PD	OC
Total costs closed centers (in EUR mln)	160-230	100-140	2-4	50-80	2-3
Per inhabitant (in EUR)	0.35-0.51	0.84-1.23	0.08-0.11	0.26-0.38	0.02-0.03

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table

Sources: Eurostat (number of asylum seekers), EMN ad hoc query on costs (2017) on costs per asylum seeker.

The potential number of take-back requests to Greece is estimated to be 16,500 based on the share of Greece in the total number of first asylum requests in the EU, according to Eurostat data. Currently, only 10 % of the take-back requests results in a transfer for various reasons (the secondary mover successfully appeals, absconds or does not cooperate otherwise, or the request is refused).

**In isolation**, the improvement of living conditions can therefore be estimated to result in **1,650 additional transfers to Greece**. Based on data that frontline Member States return about 30 % of rejected asylum seekers to their countries of origin and assuming that 25 % of those transferred back to Greece will make another successful secondary move to a preferred destination country, lifting the ban on transfers to Greece will increase the cost for that country by an estimated EUR 32 million per year and will benefit preferred destination countries by an estimated EUR 12 million per year. Of course, to the extent that **in addition, biometric identification** makes take-back requests 100 % effective, this **would result in ten times as high costs for Greece**.

Table 6.0-15 – Estimated costs of upgrading existing reception facilities to meet minimum accommodation requirements (per normal year)

Item	Total	FL	BR	PD	OC
Total costs closed centers (in EUR mln)	20	32		-12	
Per inhabitant (in EUR)	0.04	0.27		-0.06	

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table

Sources: Eurostat (Dublin requests, transfers, returns), desk research (costs).

### Reduced duration of asylum and return procedures

Another proposed measure with economic effects is the limitation of the duration of the asylum border procedure to **12 weeks** for asylum seekers from countries with a less than 20 % recognition rate (and two minor categories - a threat to security and applicants who provided misleading information). As noted in Section 5.2.3, this actually increases the current maximum duration of 4 weeks, but the new maximum number of weeks explicitly include appeals. The new pact **reduces the rights to make different appeals**, partly by the requirement to decide on asylum and return at the same time; and partly by the requirement that the same courts handle both the first instance

and the appeal. If the application is rejected in the asylum border procedure, the return border procedure commences which has an additional maximum duration of 12 weeks. In total, the duration of the border procedures (asylum and return) can last a maximum of 24 weeks. For those rejected asylum seekers who, in the end, cannot be returned to their country of origin, the length of stay does not change compared to the current situation. However, for those who are returned successfully to their country of origin during the return procedure, the limitation of appeal avenues during the asylum and return procedures does imply a shorter stay in the EU. Statistical data on actual duration of asylum and return procedures could not be found. However, a reasonable indicator of that is the average duration of stay in reception centres, which EMN reported on in an ad hoc query.<sup>676</sup> For almost all countries in the west of the EU reported, the average duration was one year or longer. The exception was the Netherlands, with an average duration of 6 months. In the east of the EU the average duration was typically between 3 and 6 months. However, Poland noted that this is caused by secondary movements (people illegally leaving to another Member State before the procedures have been completed). Thus, an average current duration in asylum and return procedures of one year is assumed. The limited rights of appeal should make it easier to complete both the asylum and return border procedure in 12 weeks each. The economic analysis assumes that the border procedures approximately halve the average duration from one year (in both the regular and accelerated procedures due to current avenues of appeals) to 24 weeks.

For the applicants from countries with a recognition rate of 20% or higher, the application of the asylum border procedure is optional. However, Euromed Rights (2021) assesses that these applicants are allocated to the regular asylum procedure (unless for reasons of security or having provided false information or documents).<sup>677</sup> Indeed, the current practice suggests that these applicants are not likely to be referred to the border procedure with no-entry fiction (and some form of detention). For example, even in the situation that a return is ordered, the number of detentions is currently relatively low, according to statistics presented in Fasani et al. (2020).<sup>678</sup> And for example, according to Dutch statistics, the total number of detentions is 3,000 per year on a total of 15,000 to 20,000 first-time applications per year.<sup>679</sup> An EPRS implementation assessment states that border procedures were recently applied only 500 times per year in Germany and 1,000 to 2,000 times per year in France,<sup>680</sup> which are small numbers compared to first-time applications or even the about 50,000 take-back requests per year in France and Germany each according to Eurostat data. The changes for applicants not entering the border procedure have not been discussed in Chapter 5. Thus, detention of asylum seekers is not likely in general, and since the asylum border procedure in practice means some form of detention, the economic analysis assumes that people do not enter the border procedure when the new pact does not make that mandatory, but rather the regular or accelerated procedure.

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<sup>676</sup> EMN (2017) Ad-Hoc Query on Average cost and average length of reception for asylum seekers, [https://ec.europa.eu/home-affairs/sites/default/files/2017.1229\\_-\\_average\\_cost\\_and\\_average\\_length.pdf](https://ec.europa.eu/home-affairs/sites/default/files/2017.1229_-_average_cost_and_average_length.pdf).

<sup>677</sup> See Euromed Rights (2021), The new Pact on Migration and Asylum, [https://euromedrights.org/wp-content/uploads/2021/05/EN\\_4AnalysisPACT.pdf](https://euromedrights.org/wp-content/uploads/2021/05/EN_4AnalysisPACT.pdf).

<sup>678</sup> See Fasani et al. (2020), Lift the Ban? Initial Employment Restrictions and Refugee Labour Market Outcomes, IZA DP No. 13149, <https://www.iza.org/publications/dp/13149/lift-the-ban-initial-employment-restrictions-and-refugee-labour-market-outcomes>.

<sup>679</sup> See Dutch Ministry of Justice and Security (2019), Report on asylum procedures (2018), <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2019/05/14/tk-rapportage-vreemdelingenketen-2018-2/tk-rapportage-vreemdelingenketen-2018-2.pdf>.

<sup>680</sup> Referred to in Euromed Rights (2021), The new Pact on Migration and Asylum, <https://www.europarl.europa.eu/thinktank/en/search.html?word=implementation+assessment&page=6>.

Nevertheless, although the same deadlines of the border procedures do not apply to the regular asylum and return procedures, the duration of the regular asylum and return procedures are also assumed to be about halved from one year to 24 weeks. The reason is that Article 35a of the proposed regulation on a common procedure for international protection<sup>681</sup> provides that the asylum decision (which ends the asylum procedure) and the return decision shall be issued at the same time. In addition, Article 53 further limits the avenues and timelines of appeals by applicants, notably that the appeal against the return decision shall be within the same time limits within which any other appeal is decided. These articles apply to both border procedures and regular and accelerated procedures. Of course, it remains to be seen how realistic this assumption is, but if the limited avenues for appeal are supposed to enable the completion of border procedures in 24 weeks, the same limited avenues of appeal should do the same for regular and accelerated procedures. The limited duration saves reception costs for those asylum seekers during these two procedures (asylum and return). As noted earlier, the mandatory border procedure is less likely to affect the rate of returns itself because it is assumed that people will not be detained much longer after the border procedure has ended, and the rejected asylum seeker could not be returned to the country of origin. The reduced duration of the procedures and limited appeal possibilities have negative impacts on human rights, as discussed in Section 6.5.1. Compared to the current situation, the savings in costs are about **EUR 500 million** per year, split roughly evenly between frontline Member States and preferred destination countries (see table below and Annex E1 for calculations).

Table 6.0-16 – Estimated benefits of reduced deadlines of border procedures and more efficient appeal procedures (per normal year)

Item	Total	FL	BR	PD	OC
Total cost savings reduced deadlines (in EUR mln)	497	229	0	251	18
Per inhabitant (in EUR)	1.11	1.95	0.00	1.24	0.18

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table

Sources: Eurostat (nr applicants, first entry), desk research (costs).

## 6.3. Impacts of mechanisms for responsibility sharing and solidarity

In this Section, we will analyse the impacts of the rules on responsibility sharing and solidarity enshrined in the RAMM. We will focus in particular on the impacts of the **rules for responsibility determination** and of the new **mandatory solidarity mechanisms**. The fundamental rights impact of solidarity within SAR operations was analysed along with impacts of the pre-entry stage.<sup>682</sup>

### 6.3.1. Social and fundamental rights impact of responsibility sharing and solidarity measures

In this section, we will focus on the fundamental rights impacts of the rules for responsibility determination and of the new mandatory solidarity mechanisms. In particular, we will focus on the

<sup>681</sup> See COM(2020) 611 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0611&from=en>.

<sup>682</sup> See section 6.2 above.

impact the RAMM will likely have on the respect of non-refoulement principles; on the right to personal liberty, on the right to private and family life; on the rights of children and unaccompanied minors; and on the right to an effective remedy. Where relevant, we will also analyse the social impact of the proposed measures. This will be done in particular for the amendments to the definition of family reunification and for relocation.

## Non-refoulement

As an exception to the rules on the attribution of responsibility, **transfers from a Member State to another are banned** when there are 'systemic flaws in the asylum procedure and the reception conditions in the Member State of destination resulting in a **risk of inhuman or degrading treatment for the applicant**'.<sup>683</sup> The exception replicates the current Article 3(2) of the Dublin III regulation, which has codified CJEU judgment in the case of *N.S. and M.E.*<sup>684</sup>

According to some observers,<sup>685</sup> however, **the RAMM sets an unreasonably high threshold for the human rights test**. This is especially in consideration of the subsequent ECtHR<sup>686</sup> and CJEU judgments.<sup>687</sup> According to this case law, transfers should also be banned even if the risk of incurring in violations of Article 3 ECHR and Article 4 of the Charter is not the result of 'systemic flaws', or in those situations where applicants may be exposed to the risk of other serious human rights violations and not just the risk inhuman or degrading treatments. In addition, as we have set out above, pre-entry procedures at external border may result in situations of 'systemic deficiencies' and hence prejudice the functioning of the RAMM.

## Right to personal liberty

The rules on responsibility sharing and solidarity have a significant impact on the right to personal liberty, in particular when it comes to the procedure for conducting transfers and to the return sponsorship. In both cases, migrants and asylum seekers may be subject to detention.

### Detention during transfers under the RAMM

**Asylum applicants may be detained pending their transfer to the responsible Member State.** The RAMM establishes that a person cannot be detained solely for the purposes of executing a transfer, but additional grounds for detention are needed.<sup>688</sup> Existing law under the Reception Conditions Directive and the extensive jurisprudence on grounds for detention thus apply, as do the safeguards.<sup>689</sup>

Under the current rules, detention could be applied if there is a significant risk of absconding. Article 34(2) of the **RAMM** removes the word 'significant.' This **lowers the threshold for detention** and may have a negative impact on the right to liberty, resulting in more persons being detained.<sup>690</sup>

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<sup>683</sup> Article 8(3), RAMM.

<sup>684</sup> C-411/10, C-493/10.

<sup>685</sup> ECRE comments on COM(2020)610, p. 18; Meijers Committee, [CM2012 Meijers Committee Comments on the Migration Pact – The Asylum and Migration Management Regulation](#), 2020.

<sup>686</sup> ECtHR, *Tarakhel v Switzerland*.

<sup>687</sup> C-578/16; C-163/17.

<sup>688</sup> Article 34(1), RAMM.

<sup>689</sup> See section 6.2 above.

<sup>690</sup> Meijers Committee, [CM2012 Meijers Committee Comments on the Migration Pact – The Asylum and Migration Management Regulation](#), 2020.

The RAMM now incorporates a definition of 'risk of absconding', but this is defined in a broader way than under the proposed recast Reception Conditions Directive.<sup>691</sup> According to Article 2(p) of the RAMM, a risk of absconding exists when the 'applicant does not remain available to the competent administrative or judicial authorities.' Such a **broad definition of absconding** fails to do justice to the requirements that detention should be necessary and proportionate, nor does it reflect the case law of the CJEU, in which it considered that absconding in the Dublin context entailed 'deliberate evasion'.<sup>692</sup>

A **positive impact on the right to liberty** is expected from the **changes proposed to the transfer procedures if detention is used**. These changes result in stricter time limits for submitting and replying to requests and carrying out transfers. Failure to respect these deadlines results in the release of the persons concerned.<sup>693</sup>

#### The impact of Return Sponsorship on personal liberty

According to many observers, **Return Sponsorship** as foreseen by the RAMM may have a negative impact on the right to liberty.<sup>694</sup> In particular, it is likely to **further stimulate recourse to detention before, during and after the transfer**.<sup>695</sup> In addition, when removal is not executed during the initial 8-month period (4 months in cases of crisis), the sponsoring Member State becomes responsible for the return. It is, however, not clear whether a new return decision needs to be issued or not. In case a new return decision is issued, the person concerned may face the risk of a further period of detention in the sponsoring Member State.<sup>696</sup>

**Return sponsorships more generally complicate compliance with the requirements for lawful detention for the purpose of removal** under EU law and international human rights law. This is especially so because the involvement of more than one Member States makes it difficult to assess a reasonable prospect of removal or due diligence in carrying out the removal, which are prerequisites for lawful detention under EU law and the ECHR.

#### Respect for private and family life

The **changes brought by the RAMM will have a positive impact on the respect for private and family life**. In particular, the widening of the notion of 'family members' will likely eliminate what has been judged as unnecessary discrimination in the enjoyment of the right to family life under article 8 and 14 ECHR.<sup>697</sup>

This said, it must be emphasised that **other provisions in the RAMM will have a negative impact on the right to private and family life**. In particular, the definition of family members put forward

<sup>691</sup> Under the recast Reception Conditions Directive, 'risk of absconding': means the existence of specific reasons and circumstances in an individual case, which are based on objective criteria defined by national law to believe that an applicant may abscond; (Article 2(10), Interinstitutional agreement reached on proposal for a recast Reception Conditions Directive [Council of the European Union, Interinstitutional File: 2016/0222 (COD), Brussels, 18 June 2018]).

<sup>692</sup> C-163/17.

<sup>693</sup> Article 34(3), RAMM.

<sup>694</sup> Francesco Maiani, 'A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact', EU Migration Law Blog, 20 October 2020; Meijers Committee, [CM2012 Meijers Committee Comments on the Migration Pact – The Asylum and Migration Management Regulation](#), 2020, p. 2; ECRE, Comments on COM(2020)610, p. 54.

<sup>695</sup> See also. Trauner, F. & Sundberg Diez, O., Discussion Paper: EU return sponsorships: High stakes, low gains?, European Policy Center, 19 January 2021.

<sup>696</sup> Maiani, A, 'Fresh Start' or One More Clunker?, 2021; Meijers Committee, Comments AMMR, p. 2; ECRE, Comments on COM(2020)610, p. 54.

<sup>697</sup> Thym, Hailbronner, EU Immigration and Asylum Law. A Commentary, 2016, 1493.

by the RAMM still excludes members of the household that existed in the country of origin (e.g. adult children, or older parents living with their adult children), or same-sex partners.<sup>698</sup> Moreover, in the case of dependent persons, the family relations covered have been reduced to the parent-child relationship.<sup>699</sup>

#### Social implications of the extension of the definition of 'family members'

With regard to the social implications of the extension of the definition of 'family member' under the RAMM, the Swedish Migration Agency and Italian and German NGOs<sup>700</sup> have emphasised that, by facilitating family reunification, the proposed changes will likely have a **positive impact on the integration of asylum seekers**. However, there are still concerns about the procedural obstacles that asylum seekers may face in proving the existence of family ties.<sup>701</sup>

#### Rights of children and unaccompanied minors:

Under the RAMM, **responsibility for the asylum application of unaccompanied minors** is placed on the Member State where the application was first registered<sup>702</sup> According to many observers<sup>703</sup>, **this runs contrary the CJEU case law**,<sup>704</sup> interpreting the Article 8 of the current Dublin III regulation in the sense that the asylum claim of the unaccompanied minor should be examined in the Member State where the child *last* applied for asylum and is present.

The proposed amendment would therefore **subject minors to potential transfers** to other Member State under the RAMM rules, delaying their access to asylum. **This is not in line with Article 24 of the Charter.**

Article 13(5) of the RAMM stipulates that the transferring Member States 'make sure' that that Member States of destination will take 'without delay' the necessary measures for the protection of the unaccompanied minor under the APR and the RCD. There is however limited explanation on how this rule would be implemented in practice. **When there is a doubt for what concerns the protection offered to unaccompanied minors in the Member State of destination, transfers should be prohibited altogether.**

Finally, under Article 13 of the RAMM, the guarantees for the **protection of the rights of minors** are reinforced. In particular, **the role of the representative is better specified.**<sup>705</sup>

#### Right to an effective remedy

The RAMM establishes procedures as a consequence of which asylum seekers may be forcibly transferred from one Member State to another. In light of the potential impact that any forced transfer may have on the fundamental rights of the persons concerned, the possibility of effective remedy should be in place. In this Section, we will analyse the impact on the right to an effective

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<sup>698</sup> ECRE comments on COM(2020)610, p. 30.

<sup>699</sup> Article 24(1), RAMM.

<sup>700</sup> Migration Pact Impact Assessment Country Research for Sweden on the basis of desk research and interviews with the Swedish Ministry of Justice, the Swedish Migration Agency and the Swedish Refugee Law Centre, Ecorys, 2021; Migration Pact Impact Assessment Country Research for Italy, Ecorys, 2021; Migration Pact Impact Assessment Country Research for Germany, Ecorys, 2021.

<sup>701</sup> See discussion in Chapter 7, section 7.6.1.

<sup>702</sup> Article 15(5), RAMM.

<sup>703</sup> ECRE comments on COM(2020)610, p. 29; Meijers Committee, Comments AMMR, p. 5; Maiani, A 'Fresh Start' or One More Clunker?, 2021.

<sup>704</sup> C-648/11.

<sup>705</sup> Article 13(3), RAMM.

remedy of the procedural rules provided by the RAMM for transfers under the responsibility determination procedure and relocation and return sponsorship.

### Remedies against transfer decisions

As outlined in Chapter 5,<sup>706</sup> the RAMM harmonises the rules on the suspensive effects of appeals by eliminating the current 'option-based model',<sup>707</sup> giving Member States the possibility to implement three different models of appeals procedure. Clearer time limits are also established in order to speed up the appeal process.

The most controversial proposal relates, however, to the **limited scope for the appeal against a transfer decision**.<sup>708</sup> Article 33(1) proposes that the appeal must be limited to the question of whether a transfer would lead to a real risk of violation of Article 4 of the Charter and to whether Articles 15 to 18 (protection of unaccompanied minors and family union) and Article 24 (protection dependent persons) have been infringed, in the case of the persons taken charge.<sup>709</sup> Moreover, and contrary to what was envisaged by the Dublin IV proposal<sup>710</sup> and by the Wikström report,<sup>711</sup> **no right to appeal is recognised when no transfer decision is taken despite the applicant's claim that another Member State is responsible**. Given the impact that any decision on transfers under the RAMM may have on the rights of individuals, the limited scope for the appeal cannot be reconciled with Article 47 of the Charter.

### Remedies against relocation decisions and Return Sponsorship

The main critical point of the new framework for **relocation** remains the fact that with possibly the only exception of the relocation of beneficiary of international protection,<sup>712</sup> **at no stage are the applicant's preferences considered**. The RAMM only establishes that when the person relocated is a beneficiary of international protection, the Member State has to 'take into account, where applicable, the existence of meaningful links between the person concerned and the Member State of relocation'.<sup>713</sup> As with past arrangements, applicants will be fully dependent on agreements between the Member States, reducing them in effect to commodities.<sup>714</sup>

Similarly, irregular migrants have no say in when a transfer takes place at the expiry of the 8-month period for executing returns under the Return Sponsorship mechanism. In the **post-transfer stage of the Return Sponsorship**, migrants with no prospect of being returned may find themselves in a Member State with which they lack any meaningful link, where they may be forced to stay in a condition of protracted irregularity.<sup>715</sup>

### Social impact of relocation decisions and Return Sponsorship

Relocation is widely seen as an instrument to increase solidarity among Member States and to lift the burden of frontline communities affected by increasing migratory movements. As outlined in

<sup>706</sup> See section 5.3.1.

<sup>707</sup> Thym, Hailbronner, *EU Immigration and Asylum Law. A Commentary*, 2016, 1568.

<sup>708</sup> ECRE comments on COM(2020)610, p. 42; Meijers Committee, *Comments AMMR*, p. 8.

<sup>709</sup> Article 33(1) first subparagraph, RAMM.

<sup>710</sup> See article 28(5), Dublin IV.

<sup>711</sup> See Wikström report, amendment 158.

<sup>712</sup> Article 57(3), RAMM.

<sup>713</sup> Article 57(3), RAMM.

<sup>714</sup> Meijers Committee, *Comments AMMR*, p. 2; ECRE, *Comments on COM(2020)610*, p. 57.

<sup>715</sup> Trauner, F. & Sundberg Diez, O., *Discussion Paper: EU return sponsorships: High stakes, low gains?*, European Policy Center, 19 January 2021.

Chapter 2,<sup>716</sup> existing evidence suggests that any distribution of asylum seekers not considering the links between the persons concerned and the destination country is bound to result in a fragmentation of community structures, increasing the mental toll on the asylum applicants. Furthermore, literature indicates that constant impediments in settling and integrating into host communities, which might result from relocation, hinders access to social protection, ultimately resulting in growing inequalities between local communities and arriving migrants.<sup>717</sup>

Similar concerns apply *mutatis mutandis* to forced transfers under the Return Sponsorship mechanisms, especially for what concerns non-returnable migrants in the port-transfer stage.

### Fundamental rights and social impact of the obligations imposed on Asylum Seekers

As seen in Chapter 5,<sup>718</sup> **applicants shall not be entitled to reception conditions** under the Reception Conditions Directive if they do not comply with the obligation to apply in the Member State of first entry or legal stay and remain in the responsible Member State.<sup>719</sup> The approach followed by the RAMM here largely mirrors that of the 2016 recast proposal of the Dublin III regulation, which has been criticised for criminalising secondary movements and for promoting a distorted image of asylum seekers as defectors ready to take advantage of the border-free Schengen area to move to their preferred country of destination.<sup>720</sup>

In particular, even if a standard of living 'in accordance with Union law, including the Charter of Fundamental Rights of the European Union, and international obligations'<sup>721</sup> must nonetheless be assured to all applicants, exclusion from reception may increase the risk of social and economic marginality for the most vulnerable among them.

### 6.3.2. Territorial impacts of responsibility sharing and solidarity measures

In this section, we will discuss how the RAMM and the Crisis instrument will **impact on the territorial distribution of asylum seekers between member states**. First, we will assess whether the changes to the rules on responsibility sharing in the new pact will significantly affect the current territorial distribution of asylum seekers at EU level. Then, we will analyse the potential impact of the proposed solidarity mechanisms as envisaged by the RAMM.

#### Responsibility distribution

Currently, **most asylum seekers are concentrated in a few Member States**. Data shows that just five countries have received the largest share (68%) of the number of first-time applications lodged in the EU-27 between 2015 and 2020 (see table 6.0-14). This situation is largely the outcome of the combined effect of the first country of irregular entry criterion, of secondary movements, and of the absence of a structured mechanism for redistributing asylum seekers throughout the EU. As suggested in Chapter 5, section 5.3.2, the ambition of the RAMM is precisely to create a system for a more fair and balanced distribution of responsibilities among Member States.

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<sup>716</sup> See section 2.2.2.

<sup>717</sup> See Valli et al. 2018.

<sup>718</sup> See section 5.3.1

<sup>719</sup> Article 9, RAMM.

<sup>720</sup> ECRE, ECRE Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270, 2016; Carrera et al., When Mobility is not a Choice, 2019; Cortinovis, Stefan, Secondary movements, 2019.

<sup>721</sup> Article 10(1), RAMM.

Table 6.0-17 – Distribution of first-time asylum application 2015-2020

Country	First-time asylum applications 2015-2020	%
European Union - 27 countries	5351720	100 %
Germany (until 1990 former territory of the FRG)	1915985	35,80 %
France	641970	12,00 %
Italy	465605	8,70 %
Spain	327525	6,12 %
Greece	307765	5,75 %
Sweden	281615	5,26 %
Hungary	211240	3,95 %
Austria	195880	3,66 %
Netherlands	148605	2,78 %
Belgium	147985	2,77 %

Source: Eurostat.

Many observers<sup>722</sup> have criticised the approach to responsibility determination followed by the RAMM for not going much beyond the limitations of the current Dublin III. This in particular because the proposal **largely maintains the rules on responsibility determination currently in force**, leaving intact the 'infamous'<sup>723</sup> first country of irregular entry criterion.

The same point of view was shared by the experts interviewed in preparation for this study, which indicated that first countries of entry would gain little advantages from the new pact.<sup>724</sup> Overall, the retention of the first country of irregular entry criterion is seen as a missed opportunity to solve some of the major problems associated with the current Dublin system.<sup>725</sup>

**The RAMM reinforces the first country of irregular entry criterion even further.** In particular, Member States will have a three-year period to return asylum seekers to the Member State of first

<sup>722</sup> ECRE(2020) Comments AMMR, p. 51.

<sup>723</sup> D. Thym, European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum, 2020.

<sup>724</sup> Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021; Migration Pact Impact Assessment Country Research for Spain on the basis of desk research and an interview with the Comisión Española de Ayuda al Refugiado (CEAR), Ecorys, 2021; Migration Pact Impact Assessment Country Research for Greece on the basis of desk research and interviews with IOM Greece and the Greek Ministry of Migration and Asylum, Ecorys, 2021.

<sup>725</sup> Migration Pact Impact Assessment Country Research for Sweden on the basis of desk research and interviews with the Swedish Ministry of Justice, the Swedish Migration Agency and the Swedish Refugee Law Centre, Ecorys, 2021; Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021.

arrival if that is the responsible State.<sup>726</sup> In contrast, under the current Dublin III this period is 12 months. In addition, the allocation of responsibility to Member States of first entry is explicitly extended also to people disembarked following search and rescue operations.<sup>727</sup> It is likely that the effect of such a change will be to **further incentivise frontline Member States to prevent arrivals** by cooperating with third countries of transit and/or origin.

As discussed in Chapter 5, Section 5.3.1., one of the objectives of the RAMM is to allow for swifter family reunification. However, many observers have suggested that **proposed changes may not have the expected positive impact on family reunification** (see also section 6.2.1 above on the fundamental rights impact).<sup>728</sup> In particular, it is not clear if the new rules will increase the number of successful take-charge requests, winning the resistance requested Member States often oppose. In addition, under the RAMM, the requesting Member State will have a reduced time limit for submitting a 'substantiated' request,<sup>729</sup> while the requested Member State will still have the opportunity to reject the request, even if only by giving 'full and detailed reasons'.<sup>730</sup>

On the other side, take-back request will become take-back notifications that can be submitted within a no-longer mandatory time limit. This means that **the passing of time will no longer entail a shift of responsibility from one Member State to another**. The receiving Member State will be only allowed to 'object' within a very strict time limit (one week).<sup>731</sup> Furthermore, as seen in Chapter 5, Section 5.3.2, the scope of the take-back request is extended to also cover beneficiaries for international protection, persons resettled to another Member States and applicants who are due to be relocated.

The asymmetry<sup>732</sup> when it comes to taking charge and taking back requests is likely to increase the pressure on the first country of entry. While take-back notification becomes unilateral and subject to no time limit (meaning that the requesting country can submit a notification at any time), take-charge requests mutuality is maintained. The outcome of this will be that while the number of asylum seekers transferred from a Member State to another on account of family reason will likely remain limited, the 'practical emergency valve' through which frontline Member States have long organised 'their own relief'<sup>733</sup> by tolerating secondary movements will be closed.

The RAMM is therefore likely to perpetuate a situation where a significant responsibility will continue to be placed on first countries of entry (more likely to make take charge requests),<sup>734</sup> while the pressure on the asylum systems of the Member States most affected by secondary movements will be somewhat alleviated. In the absence of an efficient compensatory system for the fair redistribution of responsibility to the other Member States that are now receiving a lower share of asylum applications, **the RAMM is likely to aggravate current distributive imbalances of the Dublin system to the detriment of first countries of entry**.

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<sup>726</sup> Article 21(1) of the RAMM.

<sup>727</sup> Article 21(2), RAMM.

<sup>728</sup> Migration Pact Impact Assessment Country Research for Greece on the basis of desk research and interviews with IOM Greece and the Greek Ministry of Migration and Asylum, Ecorys, 2021; ECRE(2020) Comments AMMR, p. 25.

<sup>729</sup> Article 29(1), RAMM.

<sup>730</sup> Article 30(8), RAMM.

<sup>731</sup> Article 31, RAMM.

<sup>732</sup> ECRE(2020) Comments AMMR, p. 38.

<sup>733</sup> Spijkerboer, T., Rijkman J. and den Heijer, M., Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System, *Common Market Law Review*, 2016, 53.

<sup>734</sup> ECRE(2020) Comments AMMR, p. 36.

### *Solidarity mechanisms*

The new solidarity regime established by the RAMM is meant as a **corrective to the functioning of the ordinary rules on the attribution on responsibility**. As outlined in Chapter 5, Section 5.3, the regime is described as flexible and comprehensive in design. This means that the system can be adjusted to the different situations presented by the different migratory challenges faced by Member States (flexibility) and that the focus is widened beyond traditional solidarity measures focusing on relocation (comprehensiveness).

Governmental and non-governmental experts interviewed in preparation for this study expressed scepticism as to whether the new solidarity mechanism will work in practice, suggesting that the proposed solidarity mechanism will not compensate for the persistent distributive imbalances of the system for determining responsibility<sup>735</sup>. This opinion is largely shared by many observers,<sup>736</sup> and by the EESC.<sup>737</sup>

To assess the impact that the new solidarity mechanism may have on the distribution of asylum seekers within the EU, the focus should be placed on how relocation is regulated in the RAMM.

The first consideration that can be made is that **the scope for relocation has been overall reduced**. As detailed in Chapter 5, Section 5.3.3, except for the cases in which solidarity is voluntarily offered or in situations of crisis, relocation will normally not include asylum seekers subject to the border procedure. This means that a significant share of the asylum applicants will be excluded from relocation also during situations of migratory pressure or in SAR cases<sup>738</sup>.

The **solidarity procedure is extremely complex** and, to a great extent, will depend on the discretionary evaluation of the situation made by the Commission. This makes the system **poorly accountable** and largely unpredictable.<sup>739</sup> Moreover, Member States will have the possibility to opt-out from relocation by offering solidarity in the form of return sponsorship or capacity building. Still, it is for the Commission to determine the most appropriate capacity-building measures and tally them with relocation places.<sup>740</sup>

Even if a financial contribution is envisaged to incentivise Member States to accept relocation, **the system offers Member States many avenues to avoid being forced to relocate an asylum seeker on their territory**. Even in a situation defined as of 'crisis', Member States will still have the possibility to offer solidarity by contributing to returns from the benefitting Member State, while in other cases of mandatory solidarity (SAR cases and migratory pressure), the mechanism may tolerate the possibility that the relocation needs identified by the Commission are not fully met (see Chapter 5, Section 5.3.3).

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<sup>735</sup> Migration Pact Impact Assessment Country Research for Italy, Ecorys, 2021; Migration Pact Impact Assessment Country Research for Sweden on the basis of desk research and interviews with the Swedish Ministry of Justice, the Swedish Migration Agency and the Swedish Refugee Law Centre, Ecorys, 2021; Migration Pact Impact Assessment Country Research for Greece, Ecorys, 2021; Migration Pact Impact Assessment Country Research for Spain, Ecorys, 2021; Migration Pact Impact Assessment Country Research for Germany, Ecorys, 2021.

<sup>736</sup> Francesco Maiani, 'A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact', EU Migration Law Blog, 20 October 2020; ECRE(2020) Comments AMMR; Meijers Committee, 'CM2012 Meijers Committee Comments on the Migration Pact – The Asylum and Migration Management Regulation', 2020.

<sup>737</sup> European Economic and Social Committee, Opinion on the Pact.

<sup>738</sup> See section 1.2.1.

<sup>739</sup> European Economic and Social Committee, Opinion on the Pact, § 3.8.

<sup>740</sup> Francesco Maiani, 'A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact', EU Migration Law Blog, 20 October 2020.

While as suggested above (see Section 6.2), **return sponsorships** may expose migrants subject to the return order to additional dangers in terms of fundamental rights protection, the mechanism is **not meant to facilitate the territorial redistribution of migrants within the EU**. If the mechanism functions as expected, meaning that third-country nationals are returned from the benefitting Member State within the envisaged time limits, no relocation will take place. Only after 8 months (4 in situation of crisis), the third-country nationals concerned may be transferred to the sponsoring Member State, which will become fully responsible for their return. Some observers have however criticised return sponsorship as a distortion of the idea of solidarity,<sup>741</sup> given that the mechanism is neither designed to alleviate the pressure on the asylum system of benefitting Member States, neither to improve access to protection for those in need.

Considering that some of the procedural obstructions which prevented previous exercises of solidarity from meeting the expectations (e.g. the possibility that Member States of destination have to refuse relocation on national security grounds) are also maintained in the RAMM, it is hard to see how the envisaged solidarity mechanism will be able to compensate for the distributive imbalances created by the new rules on allocation of responsibility. The risk is that, **in a situation where secondary movements will be countered more effectively, and no compulsory mechanisms are in place to force other Member States to accept the relocation of asylum seekers, the responsibility placed on frontline Member States will greatly increase.**

### 6.3.3. Economic impacts of responsibility sharing and solidarity measures

Most sharing and solidarity measures are formulated around crisis situations and around search and rescue activities. The new pact provisions concerning search and rescue activities involve a different allocation of asylum seekers rescued at sea to EU Member States and are, therefore, 'pure' sharing measures. According to UNHCR data: since 2016, about 100,000 asylum seekers per year have arrived by sea.<sup>742</sup> This is one-seventh of the total number of asylum seekers in the 'normal' year 2019. While the shift of these costs is an important economic effect, the impact assessment focuses on crisis measures since these affect much larger numbers of asylum seekers.

In this section, a scenario for migratory pressure is presented in order to capture the implications of solidarity in the form of capacity building, which is an option in a situation of migratory pressure but not an option in a crisis situation as defined by the new pact. This section further presents a crisis scenario to apprehend the implications of the two other forms of solidarity (relocation and return sponsorship) in a situation where the new pact provides that many procedures may change (for example, through suspension, extension of deadlines, criteria to determine the border procedures). Specifically, for the crisis scenario, it is assumed that in addition, situations of force majeure and immediate protection are declared. The critical mass correction mechanism that would force a minimum number of relocations on countries based on complicated criteria is ignored for simplicity: our crisis scenario assumes that countries either opt for relocations only or return sponsorship only.

The legal analysis in Chapter 5 does not discuss such scenarios in detail, but it is important to understand the interaction of the various measures. In our crisis scenario, it is assumed that a war breaks out, and hundreds of thousands of refugees flee the hypothetical Republic of Isthmus, a hitherto safe country (from which less than 20% of the applicants had their application approved). As long as those refugees do not reach the EU, the preconditions for declaring a crisis are not met. In the crisis scenario that is explored in this section (6.3.3), the refugees are assumed to eventually arrive at one EU country, overwhelming the reception capacity of that country. The scenario further

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<sup>741</sup> ECRE, Comments on COM(2020)610, p. 70.

<sup>742</sup> UNHCR, [Operational Data Portal, Refugee Situations, Most common nationalities of Mediterranean sea and land arrivals from January 2021](#).

assumes that the Commission adopts an act under which Member States 'shall' grant immediate protection to (in this case) the refugees from the Republic of Isthmus. As discussed in Section 6.4.3, the new pact lowers the conditions for the Commission to adopt such an act (compared to the former temporary protection status). Recital 10 of the Crisis Regulation confirms that also applicants under immediate protection may be relocated.

Member States have to admit applicants under immediate protection status to their territory, meaning that border procedures may not be applied either during or after the status of immediate protection. Immediate protection also grants additional rights to asylum seekers that are discussed in Section 6.4.3. In addition, countries 'may' suspend the asylum procedure of applicants under immediate protection, meaning that the assessment of the application is put on hold for a maximum of one year and then needs to restart. For the applicants of the Republic of Isthmus, the option to extend the deadline for the asylum and return border procedure by eight weeks each is not relevant because the border procedure does not apply to those under immediate protection. For countries not overwhelmed, the possibility to extend the deadlines of the border procedure is interpreted not to apply either because the extension possibility in our interpretation only applies to countries that are overwhelmed by the crisis. Only for those applicants not under immediate protection in countries that are overwhelmed, the extension of border procedure deadlines is relevant. However, assuming that immediate protection and the crisis solidarity resolve the capacity problems, the impact of extending border procedure deadlines is not further explored.

The analysis assumes that the 5-day screening will still always take place in the country of first entry because the asylum procedure starts after this screening and because RAMM article 57(2-3) provide that the country of first entry must determine whether the applicant presents a risk to security or public order (which the country of relocation must confirm in one week according to RAMM article 57(6-7)). A practical reason for this assumption is that it needs to be determined that the asylum seekers are indeed from the Republic of Isthmus.

In the crisis scenario, other Member States hold two options to support the country whose reception capacity is overwhelmed: relocation or return sponsorship. The interaction between relocation and immediate protection deserves closer scrutiny. When the beneficiary of immediate protection is relocated to another Member State, the responsibility for the application shifts to the Member State of relocation pursuant to Article 58(3) of the RAMM. The Member State of relocation has then the option to resume the asylum procedure even if the Member State of first entry had suspended it because of its asylum system being overburdened. In fact, the Member State of relocation may have adequate reception and processing capacity to begin the asylum procedure immediately. Given that the stated reason for halting the asylum procedure is a lack of capacity, one may expect the Member State of relocation to begin the process right away if it possesses the capacity. However, another rationale for suspending the asylum procedure also in the Member State of relocation could be the possibility that the safety situation in the country of origin improves during the year of suspension, after which it may be easier to return the asylum seekers to the hypothetical Republic of Isthmus. In our crisis scenario, it is assumed that the Member State of relocation continues the suspension of the asylum procedure pending the duration of the immediate protection status.

One other aspect of solidarity that is not related to a situation of migratory pressure or a crisis situation is discussed as well, namely the Dublin procedure where the removal of an 18-month transfer deadline is deemed to exert a significant impact.

### **Removal of 18 month Dublin transfer deadline**

With regard to the Dublin rules, it should be remarked that the new pact does not affect their core. It newly provides that the responsibility of a country in which an educational institute issued a diploma goes before the responsibility of the country of first entry. No data is available on the

number of diplomas that another EU country has issued before persons request asylum in the EU. Still, this assessment assumes that their number is small. A change in Dublin rules that was investigated for its potential economic impact is the removal of an **18-month deadline** after a Dublin take-back request has gone out to realize the transfer in the situation that secondary mover has absconded. After this deadline has expired, the responsibility for the secondary mover shifts to the country that sent out the request. The removal of this deadline means that the country responsible for assessing the asylum application never changes. The removal of this deadline is estimated to shift about **EUR 50 million** per year of costs from preferred destination countries to frontline Member States (see table below and Annex E2 for the calculations).

Table 6.0-18 – Estimated change in costs due to the removal of the 18-month deadline for Dublin transfers (per normal year)

Item	Total	FL	BR	PD	OC
Total cost savings reduced deadlines (in EUR mln)	-5	50	-1	-50	0.0
Per inhabitant (in EUR)	-0.01	0.42	-0.04	-0.27	0.00

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table

Sources: Eurostat (nr transfers by duration since request), desk research (costs).

## Relocation compensation

One of the solidarity proposals is that Member States receive **EUR 10,000 compensation** per asylum seeker for relocations. However, the cost of accommodation (refurbishment), cost of living and healthcare combined alone are estimated EUR 11,000 per year in preferred destination countries (Ecorys calculations based on the EMN Ad hoc query of 2017).<sup>743</sup> Staff costs and costs to build reception capacity need to be added to this. Thus, a one-year relocation is financially unattractive if it takes an average of more than a year to effectively return an asylum applicant following a negative decision or to initiate a take-charge procedure. Also, taking into account costs of procedures and investments, the previously cited EMN Ad hoc query of 2017 indicates that costs per asylum seeker per year far exceeds EUR 10,000. The cost would be less in other Member States than the preferred destination countries (with lower purchasing power), but not enough to make the EUR 10,000 compensation per relocation financially attractive. The attractiveness of the compensation is further reduced if we consider that all Member States contribute to the fund out of which the EUR 10,000 compensation is paid.

<sup>743</sup> EMN, [Ad Hoc Query on Average cost and length of reception for asylum seekers](#), 2017.

## Solidarity scenarios

As already discussed, significant changes in the new proposals which affect solidarity are the proposed measures in **cases of migratory pressure and of a crisis**. Eurostat data show that in 2015, the number of asylum applicants was twice as high as in 2019: about 1.2 million compared to 600 thousand. About 400 thousand asylum applicants in 2015 came from Syria, and 98 % of their applications were approved. The future crisis scenario assumes an **additional 600 thousand** asylum seekers in one year from a country where war has just broken out in a country that was safe before the war. After the war ends, the country is assumed safe again, so war refugees would be ordered to return to their country of origin.

The crisis scenario, in addition, assumes that the Commission would evoke the **immediate protection** status. It is noted that the proposed measures grant this competence to the Commission, which is a significant change compared to the current Temporary Protection Directive (Article 4(2)), where a two-thirds majority of the Council must approve the possibility to grant asylum seekers a temporary protection status (see Chapter 5). If the Commission would not evoke the immediate protection status in the crisis scenario described above, war refugees would be subject to the border procedure (with no-entry conditions) because the pre-war statistics still indicate that less than 20 % of the applications of asylum seekers from that country are rejected. However, no capacity in the EU exists to detain (or otherwise restrict the movement of) 600 thousand additional asylum seekers, and the asylum system would collapse. The immediate protection status may lead to a suspension of the asylum procedure for up to one year and grants those under immediate protection access to the EU, after which they must enter the regular asylum procedure. A practical implication is that the war refugees may be hosted **in open reception centres** instead of closed reception centres.

Another change that is assumed in both the migratory pressure scenario and the crisis scenario is that the solidarity mechanism is triggered, in which **compulsory solidarity** for the war refugees is allocated to all Member States, with **50 % based on their population and 50 % on their GDP** (the 'solidarity key'). In the refugee crisis of 2015 and later, about 70 % of Syrians applied for asylum in Germany alone, according to Eurostat data. For simplicity, the future scenario assumes that 50 % of the war refugees apply for asylum in frontline Member States (Greece, Italy and Spain), and 50 % of them applies for asylum in preferred destination countries in the northwest of Europe.

The solidarity key allocates most responsibility to the preferred destination countries (53 % of the war refugees) and to a lesser extent to the frontline Member States (24 %). The high solidarity share of the group of frontline Member States is not surprising given that both Italy and Spain are large countries. According to Eurostat data on population and GDP, the solidarity key makes a group of countries along the Balkan route jointly responsible for 6 % of the war refugees and the other countries for 17 % combined.

It is difficult to predict the likelihood of migratory pressures and crises. In recent years, the most significant crises that affected the EU were the war in Syria (from 2011, peak in 2015-2016) and the Yugoslav wars (1991-2001). In the economic impact assessment, it is assumed that a situation arises with abnormally high numbers of refugees from clearly unsafe countries every five years. In a situation of migratory pressure, countries have **three options** to comply with compulsory solidarity (see Section: 5.3.4):

1. Capacity building (in certain cases);
2. Relocation;
3. Return sponsorship.

It is noted that in a crisis situation, Member States are allowed to place asylum seekers from countries from which less than **75 %** of the applicants are recognized in the **border procedure**. Since the lack of closed reception centres is the bottleneck in a crisis situation, and the border procedure requires closed reception centres, it is considered to be unlikely that Member States will use the possibility in a time of crisis.

The capacity building option will be discussed for the migratory pressure scenario, relocation and return sponsorship for the crisis scenario.

### Migratory pressure solidarity, option (1) capacity building

In the first option, countries build capacity for the excess numbers of refugees during every year of migratory pressure. The assumption is that even though a reception facility lasts much longer (assumption: 30 years) than the average time between two years of migratory pressure (assumption: 5 years), countries cannot use the argument that they already built capacity during a previous situation of migratory pressure, or during a previous year of ongoing migratory pressure. Thus, a **reception centre built in one's own country** can be used for in total six situations of migratory pressure in **30 years**. However, to show solidarity by **building capacity in another country**, it is **assumed** that a new reception centre needs to be built **every year of migratory pressure**.

It is assumed that (less costly) open reception centres would be built. In the hypothetical situation that all Member States choose this option, this would hugely **benefit frontline Member States**, where half of the additional asylum seekers are assumed to arrive in line with the Syria crisis in 2015. The reason is that compared to their GDP, they receive many asylum seekers, by about **EUR 2.5 billion** after annualizing costs per calendar year. This option would **cost EUR 2.5 billion at EU level** after annualizing per calendar year (see table below and Annex E2 for the calculations).

Table 6.0-19 – Estimated change in costs due to compulsory solidarity, capacity building option (years of migratory pressure, annualised per calendar year)

Item	Total	FL	BR	PD	OC
Change in cost of option 1 (building capacity) in year of migratory pressure (in EUR mln.)	12,400	-12,300	4,200	8,700	11,800
Total cost of option 1 (building capacity) annualised per calendar year (in EUR mln.)	2,500	-2,500	800	1,700	2,400
Per inhabitant (in EUR)	5.50	-20.90	26.30	8.60	24.60

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table

Sources: Eurostat (additional number of asylum seekers in 2015), desk research (costs).

### Crisis solidarity, option (2) relocation

In the second option of relocation, war refugees are relocated from Member States of first entry to other Member States on the basis of population and GDP.

To the extent that integration during the year of immediate protection consists of language courses and familiarizing with national institutions, the **benefits of integration efforts** in the country of relocation are **uncertain and not estimated**.

Assuming the refugees in crisis years arrive in equal numbers at frontline Member States and in the preferred destination countries, **relocation** shifts the costs mostly from frontline countries to other Member States because those other Member States become fully responsible for the asylum procedure. Assuming that half of the refugees arrive at the preferred destination countries as the country of first entry, the solidarity key allocates a number of refugees to these countries that would have arrived there anyway. Thus, per head of the population, relocation shifts the costs more strongly from the frontline Member States to Member States that are less affected by migration flows (“Balkan Route” and “Other Countries”) than to the preferred destination countries.

Table 6.0-20 – Estimated change in costs due to compulsory solidarity, relocation option (crisis years, annualised per calendar year)

Item	Total	FL	BR	PD	OC
Change in cost of option 2 (relocation) in crisis years (in EUR mln.)	16,356	-6,661	3,463	12,494	7,059
Total cost of option 2 relocation annualised per calendar year (in EUR mln.)	3,271	-1,332	693	2,499	1,412
Per inhabitant (in EUR)	7.32	-11.34	21.81	12.38	14.70

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table

Sources: Eurostat (additional number of asylum seekers in 2015), desk research (costs).

### Crisis solidarity, option (3) return sponsorship

The third option is that of return sponsorship. This is another form of solidarity because the sponsoring country commits to permanent responsibility for irregularly staying migrants if the attempts at returning them to the country of origin fail. The highest cost, according to the yearbooks of Sweden, is about **EUR 25,000 to settle one person** or family in their country of origin.

At the EU level, the **rate of return** is assumed not to change by return sponsorship. According to Eurostat data, it is true that other countries have on average slightly higher return rates than the frontline Member States they would be sponsoring. However, when other countries would attempt to return larger numbers of persons, it is likely that their return rate would drop.

In this scenario, it is assumed that rejected asylum seekers stay briefly enough (4 to 8 weeks) in the country of first entry before they are returned or relocated to the sponsoring country **to avoid construction of additional reception capacity in the country of first entry**. Due to the assumption that crisis capacity construction is not duplicated, the estimated cost at the EU level of this third option is similar to that of the first option of capacity building, namely EUR 2.8 billion per year. The estimated net benefit for the frontline Member States would be EUR 1.1 billion per year. This is financially the **most attractive option for preferred destination countries** because they would be responsible for a similar number of asylum seekers according to either the 'first entry' criterion or the 'solidarity key' criterion (see table below and Annex E2 for the calculations).

Table 6.0-21 – Estimated change in costs due to compulsory solidarity, return sponsorship option (crisis years, annualised per calendar year)

Item	Total	FL	BR	PD	OC
Change in cost of option 1 (building capacity) in crisis year (in EUR mln.)	13,800	-5,400	3,200	9,300	6,600
Total cost of option 1 (building capacity) annualised per calendar year (in EUR mln.)	2,800	-1,100	600	1,900	1,300
Per inhabitant (in EUR)	6.20	-9.10	20.30	9.30	13.70

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table

Sources: Eurostat (additional number of asylum seekers in 2015), desk research (costs).

### Most likely used option

Comparing the outcomes of the two options in a crisis scenario, return sponsorship is financially the most attractive for countries other than the frontline Member States in both years of migratory pressure and in crisis years (and least attractive to frontline Member States). However, the longer the time between years of migratory pressure (assumed 5 years in our scenario) takes, the more attractive capacity building becomes.

## 6.4. Impacts of the Immediate Protection Status

In this Section, we will assess the impact of the proposed immediate protection status for a limited period of time equivalent to subsidiary protection status, as introduced in the Crisis instrument.

As suggested in Chapter 5 (Section 5.4.), one of the main important novelties introduced by the crisis and force majeure regulation is the power of the Commission to **trigger immediate protection** in situations of crisis. According to many observers, this may facilitate the recourse to this instrument,<sup>744</sup> overcoming many of the problems that in the past prevented the activation of the Temporary Protection Directive.<sup>745</sup>

It must be recalled, however, that the definition of 'migratory crisis' still remains very broad and open to interpretation. As a consequence, it is impossible to predict which situations will be considered as of 'crisis', providing an exact quantitative estimation of the potential impact of immediate protection.

### 6.4.1. Fundamental rights and social impact of immediate protection

Persons granted immediate protection will benefit from **equivalent economic and social rights** than subsidiary protection beneficiaries. Notably, these rights will include the right to family unity,

<sup>744</sup> Meijers Committee, Comments on the Migration Pact – Crisis and Force Majeure Regulation, 2020, p. 4; Ineli-Ciger, M., What a difference two decades make? The shift from temporary to immediate protection in the new European Pact on Asylum and Migration, *European Journal of Migration and Law*, 11 November 2020.

<sup>745</sup> Ineli-Ciger, M., Time to Activate the Temporary Protection Directive, *European Journal of Migration and Law*, 18(1), 2016, 1-33.

freedom of movement within the Member State, access to employment, access to education, social security and assistance, healthcare and access to integration measures.<sup>746</sup> This represents a **clear improvement** in comparison to the rights offered by temporary protection, which do not offer to holders an absolute right to family reunification, nor freedom of movement and equal treatment with nationals of the Member States with regard to access to economic and social rights.<sup>747</sup>

#### 6.4.2. Territorial impact of immediate protection

As outlined in Chapter 5 (Section 5.4.), immediate protection status should not be regarded as an additional form of protection under EU law. It only assigns to the beneficiaries a temporary legal status comparable to subsidiary protection. This is done also with the aim of temporarily relieving the pressure on the asylum system in the Member State of first arrival.

Migrants granted protection status will be therefore free to circulate within the Member State of arrival and, possibly, within the Schengen area of free movement for a short-term period, provided certain conditions are met.<sup>748</sup> In fact, however, the offer of **immediate protection will only postpone the processing of international protection** applications for a maximum of one year upon which the resumption of the examination of the asylum application needs to take place.<sup>749</sup> This means that asylum seekers who have moved to another Member State shall be brought back to the Member State responsible according to take-back procedures.

**The impact of immediate protection on the territorial distribution of asylum seekers is it, therefore, likely to be limited.**

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<sup>746</sup> COM(2020)613, p. 10.

<sup>747</sup> Ineli-Ciger, M., What a difference two decades make? The shift from temporary to immediate protection in the new European Pact on Asylum and Migration, *European Journal of Migration and Law*, 11 November 2020.

<sup>748</sup> Beneficiary of international protection holding a residence permit and a valid travel document may move freely within the Schengen area for a period of up to 90 days in any 180-day period (see Article 21, Convention Implementing the Schengen Agreement). Arguably, those receiving immediate protection status should receive a residence permit.

<sup>749</sup> Article 10(3), Crisis and Force Majeure Regulation.

### 6.4.3. Economic impact of immediate protection

#### No impact of immediate protection on approval rates expected

The financial implications of the immediate protection status depend significantly on when and to whom the Commission determines the need to apply for **immediate protection** status. It seems clear that the Commission would grant this status **only for specific groups in crisis** years where above-normal numbers of people seek asylum, as was the case with Syrians in 2015. In 2015, out of the 164,720 asylum applications by Syrians, 163,975 were decided positively, of which 160,040 in the first instance and a further 4,790 after appeals.

In 2015 the Commission did not propose to offer temporary protection status to applicants from Syria. In hindsight, if they had hypothetically done that, the outcome in terms of successful asylum applications would probably have been the same: the 745 rejected applications are small compared to the total, and the new pact still allows to reject applications of asylum seekers who are judged to be a security threat or have committed serious crimes. Therefore, it is assumed that the approval rate of additional asylum applications during a crisis year is close to 100 % with or without immediate protection status.

#### Slight efficiency gain expected by suspending asylum procedures

Immediate protection results in a slight **efficiency gain** because the Commission will decide on this status for a group of asylum seekers rather than Member States on an individual basis. In addition, the suspension of the asylum procedure likely **helps avoid a backlog** during the year of immediate protection. On the other hand, after the immediate protection has ended, the postponed asylum applications still need to be processed in large numbers. Therefore, the only administrative benefit is that countries have more time to hire temporary staff to process the applications. The force majeure provision that allows postponing the deadlines of procedures will also help make the processing of applications feasible but is not likely to affect costs much either.

#### Advancing integration courses has mixed costs and benefits

Those granted immediate protection will be given the same rights as those currently under subsidiary protection, including amongst other rights to family reunion, education, employment and social welfare. When assessing the impacts of this, it should be noted that the approval rates of the applications of the additional numbers of asylum seekers during crisis years (for example, of war refugees) is close to 100 %. Thus, without immediate protection status, these rights would be granted six months later, or even later, given the likely backlog without immediate protection status. However, **immediate protection does not increase the cost of integration** but only advances these costs (on average EUR 6,000 per asylum seeker according to OECD<sup>750</sup>). It may cost additional efforts to start integration courses at short notice, but these could not be estimated.

The fact that integration courses start six months earlier also means that the benefits of integration are reaped six months earlier. These could not be estimated either, but all in all, the implication that immediate protection results in integration starting six months earlier is assessed to result in a **minor net benefit**.

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<sup>750</sup> OECD, [Who bears the cost of integrating refugees?](#), 2017, p. 3.

## 6.5. Conclusions

The tables below provide overviews of the expected impacts of the proposed measures included in the new pact, per dimension, as presented in this chapter.

Table 6. 0-22: Overview of impacts of pre-screening procedures

Item	Consequence	FR and social	Territorial and economic
Human rights monitoring though requirements are still undefined	More monitoring	Improved human rights depending on how monitoring is interpreted	Costs may be limited depending on how monitoring is interpreted
Non-entry during screening	More detentions	Less personal liberty, including for children	Limited because duration is limited
	Refoulements if rights monitoring is inadequate	Violation of human rights, risk of persecution in the country of origin	Reduced costs
Lack of adequate mechanisms for identifying vulnerability during border procedures	Inadequate care if rights monitoring is inadequate	Special needs are not met, health risks	None, although potentially higher costs in the longer run
Collection of biometric data	Secondary movers better identified	Data privacy risks though provisions exist against sharing with third countries	Modest investment cost, more transfers and shift of reception costs back to frontline Member States
Debriefing form	Administrative burden, Frontex might operate more effectively if the form is shared with the Agency	Potentially more refoulements	Substantial costs, uncertain benefits, more demand for (costly) smuggling of humans (if debriefing forms help hinder irregular entries)
Broader EU definition of "safe" countries and mandatory border procedures	More detentions	Less personal liberty, conflict with CJEU case law, discrimination by nationality, reduced integration	Higher costs, fewer secondary movements during border procedure
	Concentration in hotspots	Crowding and infection risks, opposition from local residents	Overexposure of border regions in countries if border does not move with asylum seeker
Exemption of families with children under 12 and unaccompanied minors from the border asylum and return procedures	Less detentions	Safeguard of child rights	None compared to the baseline

Adequate reception requirement though lacking enforcement rules	Better accommodation	Improved health depending on compliance	Increased costs depending on compliance
	No more bans on take-back transfers due to poor conditions	None	Shift of costs to frontline Member States
Reduced deadlines, limited avenues for appeal	Shorter procedures	Higher risk of refoulement	Benefits outweighing costs of pre-screening procedures though only for preferred destination countries

Solidarity mechanisms refer to Dublin procedures in normal years and to compulsory solidarity in crisis years (see table below).

Table 6. 0-23 – Overview of impacts of solidarity mechanisms

Item	Consequence	FR and social	Territorial and economic
Lower thresholds for detention of secondary movers	More detentions, less absconding	Less personal liberty	Increased transfers back and shift of costs to frontline Member States
Stricter time limits for submitting/responding to requests and carrying out transfers	Less detentions	More personal liberty	Limited
Less evidence needed for family reunification take charge requests; inclusion of family ties formed en route	More take charge transfers	Improved family life, better integration	Shift of costs from frontline Member States
Limitation of take charge transfers to dependent parent/child relations	Fewer take charge transfers	Reduced family life for siblings and adult children, less integration	Shift of costs to frontline Member States
Lack of monitoring mechanisms in return sponsorships and relocation	More detentions	Less personal liberty	Limited
Removal of deadline for Dublin take-back transfers	More take-back transfers	More detentions, less personal liberty	Shift of costs to frontline Member States
EUR 10,000 compensation for relocation	Money transfer	None	Ineffective to incentivize Relocation because it does not cover the cost of even one year of reception
Migratory pressure compulsory solidarity, option (1) capacity building	More reception facilities	None	Shift of costs to countries less affected by migrant flows
Crisis compulsory solidarity option (2) relocation	Responsibility for asylum procedure shifts to country of relocation	None	Shift of costs from frontline Member States

Crisis compulsory solidarity option (3) return sponsorship	Relocation after failure to return migrant to country of origin	Risk of multiple detentions, less personal liberty	Ineffective crisis measure because it takes effect after refugee crisis is over and asylum seekers may be returned; shift of costs to countries less affected by migrant flows
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Lastly, immediate protection has limited impacts because this status suspends the asylum procedure for only one year (see table below).

Table 6.0-24 – Overview of impacts of immediate protection

Item	Consequence	FR and social	Territorial and economic
Suspension of asylum procedure	Integration starts at once instead of after 6-month asylum procedure	Earlier integration if the asylum application is eventually approved	Gives more time to prepare for the same number of asylum applications; earlier integration benefits unless asylum seeker is relocated
Equivalent economic and social rights as subsidiary protection beneficiaries	Rights to housing, healthcare, moving to other Member States for 90 days	Positive impact on protection of fundamental rights	Limited, the asylum procedure is only postponed for one year
Entry to the EU	No border procedure after immediate protection ends	Less detentions	Less detention costs, more secondary movements, shift of costs from frontline Member States

- The proposed new pact stands to have impacts on all dimensions analysed, most significantly on the fundamental rights and territorial dimensions. In particular, NGOs have raised concerns about the new pact's potential impact on **safe pathways** for migrants and asylum seekers, further arguing that the new pact will make it more difficult for migrants and asylum seekers to secure territorial access. In turn, this may enhance their dependency on irregular and/or illegal routes and exposure to **criminal activity and networks**. **Return sponsorships** may also expose migrants subject to the return order to additional **dangers** in terms of fundamental rights protection. In addition, the mechanism is not designed to facilitate the territorial redistribution of migrants within the EU, neither to alleviate the pressure on the asylum system of benefiting Member States. However, return sponsorship is likely only a financially attractive option for preferred destination countries compared to the other options under compulsory solidarity because they could 'sponsor' the return of the number of rejected asylum seekers they are already responsible for;
- Given the mandatory nature of pre-entry screening and border procedures under the new pact, the number of **people forcibly kept in border regions** may increase significantly. Related proposals will likely have repercussions on the reception

system of frontline Member States, potentially enhancing **territorial unbalances** by concentrating large reception facilities at the EU's external borders. Agreeing that the current standards of reception facilities vary greatly between as well as within Member States, representatives from international NGOs and national authorities have also suggested that the new pact may have a **detrimental impact on local communities**. However, they also note that the new pact might aid in promoting the existence of 'social capital' for applicants and local communities. Replacing open centres with closed centres involves **substantial costs**, and the resulting reduction in secondary movements leads to a **shift of costs** from preferred destination countries to frontline Member States;

- The solidarity mechanism envisaged by the RAMM will **not be able to compensate for the distributive imbalances** created by the new rules on allocation of responsibility. This, in particular, is a consequence of the fact that the system offers Member States many avenues to avoid being forced to relocate an asylum seeker on their territory.
- Our economic impact analysis shows that return sponsorship is financially the most attractive for Member States other than the frontline Member States.
- The RAMM is expected to reinforce the first country of irregular entry criterion even further. In addition, allocation of responsibility to Member States of first entry is explicitly extended also to people disembarked following SAR operations. It is likely that the effect of such a change will be to further **incentivise frontline Member States to prevent arrivals** by cooperating with third countries of transit and/or origin;
- More positively, several Member State representatives and NGOs have noted that the reallocation and solidarity mechanisms proposed under the new pact **may have positive impacts on family reunification**. However, it remains **unclear if the new rules on family reunification will increase the number of successful take-charge** requests, increasing the currently very limited number of asylum seekers transferred from Member States of first entry to other Member States on account of family reasons.
- **Mandatory border procedures and minimum reception standards generate net advantages for all countries of around €500 million at the EU level.**

It is worthwhile to note that the multiannual financial framework for 2021-2027 allocates €8.7 billion to the Asylum and Migration Fund (AMF), €5.5 billion to the Integrated Border Management Fund and (IBMF) and €5.1 billion to the reinforced European Border and Coast Guard Agency (EBCGA, the successor of Frontex).<sup>751</sup> While these amounts are substantial, they amount to approximately only €1 billion per calendar year. Thus they cover only a fraction of the cost of a lifetime stay of one annual group of rejected asylum seekers who could not be returned to their country of origin. Overall, the new pact imposes little financial solidarity on countries most affected by migrant flows with foremost the frontline Member States (Greece, Italy, Spain) and to a lesser extent with preferred destination countries (in the northwest of Europe).

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<sup>751</sup> European Council. Note: Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions. EUCO 10/20. Brussels, 21 July 2020.

## 7. Assessing effectiveness, proportionality and coherence of the new pact on migration and asylum

### Key Findings

- The proposed reform of the governance framework will likely improve the overall coordination between the EU and the national level. However, no role is envisaged for the European Parliament and the Council in the development of the European asylum and migration management strategy. This creates a deficit of democratic accountability, which is likely to undermine the effectiveness of the whole framework;
- The problems that the screening proposal intends to address are not caused by a lack of harmonised rules but by the lack of effective implementation and application of existing rules. Moreover, the choice of a regulation is at odds with the fact that many crucial elements are left to Member States' discretion, most prominently the use of detention. This means that the screening proposal does not achieve the desired legal clarity;
- The pact does not provide clear answers to the most acute problems with regard to the current use of border procedures by the Member States. Instead of solving the current implementation challenges of the CEAS, proposed amendments will increase the detention of asylum seekers at the border, reducing the quality of the reception offered in frontline Member States;
- The RAMM does not appear to have clear benefits over Member State action in achieving the Treaty-based goal of a common policy on asylum. The new solidarity mechanism is extremely complex and gives Member States the possibility to opt-out from solidarity in the area of asylum (relocation) by contributing to solidarity through return sponsorships or capacity-building. Return sponsorship is aimed more at improving the effectiveness of returns than at establishing a system for sharing responsibility in the field of asylum;
- By retaining the first country of irregular entry criterion, the EAV of the RAMM remains limited with regard to responsibility sharing in the area of asylum. Moreover, extending the first country of irregular entry criterion to persons disembarked after SAR operations will likely reinforce the perverse incentive for Member States to prevent arrivals;
- The establishing of a monitoring mechanism is a step in the right direction to address some of the problems related to the effective access to rights of migrants and asylum seekers. However, the scope of the mechanism remains limited and framework proposed to ensure its functioning does not guarantee independence and clear follow-up procedures.

### 7.1. Introduction

In this chapter, we examine the effectiveness, proportionality and coherence of the pact.<sup>752</sup> We discuss whether the proposed legislative instruments would remedy the problems and gaps identified and achieve the objectives of the Pact in a balanced and proportionate way.

As we have shown in the previous chapters, the relationship between problems, measures, and objectives is not always set out in the pact<sup>753</sup>. Moreover, at times, objectives are not clearly

<sup>752</sup> Efficiency means that the same (desired) outcome could not have been achieved with fewer resources. The new pact is generally too unspecific about the desired outcomes, goals and priorities to assess efficiency. For example, the provisions of "adequate" reception conditions and of human rights monitoring do not provide more than that they must be ensured, and one could assume that these conditions will be complied with efficiently. More in general, an assessment of efficiency is a moot point to the extent that the new pact is not effective, in particular with regard to human rights.

<sup>753</sup> See in particular Chapter 2 and 3.

distinguished from measures, which makes it difficult to assess the relationship between means and ends. To make it easier, we follow the structure and set-up of the SWD. We thus assess the effectiveness, proportionality and coherence of the proposed measures with regard to the five main objectives of the pact: a more efficient, seamless and harmonised migration management system (Section 7.2.); a fairer, more comprehensive approach to solidarity and relocation (Section 7.3); simplified and more efficient rules for robust migration management (Section 7.4); a targeted mechanism to address extreme crisis situations (Section 7.5.) and a fairer and more effective system to reinforce migrants and asylum seekers' rights (Section 7.6.). In this way, we do not assess the effectiveness, proportionality and coherence of the pact on the level of the individual proposals alone but also of the system of the pact as a whole.

## 7.2. A more efficient, seamless and harmonised migration management system

Through establishing 'a more efficient, seamless and harmonised migration management system', the pact aims to remedy problems encountered on account of an unlevel playing field across Member States. Measures included in several instruments are associated with this objective. In particular, under this objective, the Commission proposes to establish (1) a comprehensive approach for efficient asylum management; (2) a coordinated, effective and rapid screening phase and (3) a seamless asylum-return procedure and an easier use of border procedures.

### 7.2.1. A comprehensive approach for efficient asylum management

In order to establish a comprehensive approach for efficient asylum management, the RAMM proposes reforms to the **governance framework**. Furthermore, other proposed measures have implications for role and functions of EU agencies even if the SWD does not connect these to a specific objective in the Pact.<sup>754</sup> This affects the governance of migration, in particular for what concerns coordination between the EU and Member States. For these reasons, the effectiveness, proportionality and coherence of the measures relating to the **role and functions of Frontex and EASO (and the future EUAA)** are discussed in this section.

#### Effectiveness

In view of persistent implementation problems and lack of uniformity across Member States in the application of the CEAS, reforming the governance framework has clear European Added Value (EAV). This is particularly so with regard to improvements to the overall coordination between the EU and Member States by means of a European asylum and migration management strategy coupled with national strategies.<sup>755</sup>

The new governance framework is meant to offer a comprehensive view of the situation at the EU level, allowing for an early identification of gaps that need to be addressed. Given the strategic role attached to it, also in relation to the functioning of the new solidarity mechanism,<sup>756</sup> it is surprising to see that **no role is envisaged for the European Parliament and the Council** in the development

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<sup>754</sup> See discussion in Chapter 5, section 5.5.2.

<sup>755</sup> See Chapter 5, section 5.5.1.

<sup>756</sup> See Chapter 5, section 5.3.4.

of the European asylum and migration management strategy.<sup>757</sup> This creates a **deficit of democratic accountability** which is likely to undermine the effectiveness of the wider framework.

Other concerns are related to the **functions and role of agencies** in the implementation of the pact. While their increased role has been welcomed by various stakeholders, including EASO itself,<sup>758</sup> this comes with a persistent **ambiguity in their political and legal mandate**. In consideration of the extent to which EU agencies are currently involved in the screening procedures in hotspots, and their impact on the actual exercise of executive powers by national authorities,<sup>759</sup> there is a potential need to further clarify their respective responsibilities.<sup>760</sup> This ambiguity may **hinder setting up a governance framework based on a balanced coordination between the EU and Member States**.<sup>761</sup>

## Proportionality

National obligations with regard to the European asylum and migration management strategy are likely to involve a heavy **administrative burden**, therewith raising proportionality concerns.

The increased role envisaged for EU agencies, in particular for what concerns the evaluation and monitoring of the implementation of the Pact by national authorities, will further reinforce the **asymmetry between the national- and the EU level**.

## Coherence

**The Pact does not specify how the European asylum and migration management strategy should be coordinated with the EU strategy in the context of integrated border management.**<sup>762</sup> This is noteworthy, considering that many of the proposed measures (e.g. the pre-entry screening, or the new solidarity mechanism for SAR cases) will directly affect the implementation of an integrated border management strategy. Furthermore, according to Article 6(1) RAMM, the European asylum and migration management strategy shall be developed in accordance with the principles set out in the second part of RAMM. It does not include a reference to conformity with general principles of EU law and international law in the field of migration and asylum.<sup>763</sup>

<sup>757</sup> According to Article 6(1), RAMM, the European Asylum and Migration Management Strategy is just transmitted to the European Parliament and to the Council.

<sup>758</sup> Migration Pact Impact Assessment interview with European Asylum Support Office, Ecorys, 2021.

<sup>759</sup> Dutch Council for Refugees, Greek Council for Refugees, CIR, ECRE, ProASyl, '[The implementation of the hotspots in Italy and Greece: A study](#)', 2016; Horii, Satoko. (2018). '[Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis](#).' *Refugee Survey Quarterly* 37(2), p. 204-30.

<sup>760</sup> ECRE, '[Comments on the Screening regulation](#)', 2020, p. 17.

<sup>761</sup> Existing evidence suggest that, given their weak operational autonomy and deficit of democratic accountability at the EU level, executive agencies in the field of migration and asylum are increasingly used as proxies by stronger Member States to monitor and intervene in weaker Member States (see in particular: Ripoll Servent, A. (2018). '[A New Form of Delegation in EU Asylum: Agencies as Proxies of Strong Regulators](#)'. *JCMS: Journal of Common Market Studies*, 56: 83– 100; Tsourdi E. (2020). '[Beyond the 'Migration Crisis': The Evolving Role of EU Agencies in the Administrative Governance of the Asylum and External Border Control Policies](#)'. In Slominski, P. & Pollak, J., *The Role of EU Agencies in the Eurozone and Migration Crisis*, Palgrave Macmillan, 2020.

<sup>762</sup> Article 8(4) [Regulation \(EU\) 2019/1896](#).

<sup>763</sup> ECRE, '[Comments on the Commission Proposal for a Regulation on Asylum and Migration Management COM \(2020\) 610 2020/0279 \(COD\), 2020](#)', p. 15.

With regard to the functions and role of agencies, it must be recalled here that the Pact package does not significantly alter the legal mandate of EU agencies. This, according to some observers,<sup>764</sup> produces a situation whereby **the novel functions envisaged for EU agencies are not satisfactorily embedded in their current legal framework.**

In particular, **the amended Asylum Procedures Regulation does not specify the role of EU agencies in general and of the future EUAA specifically.**<sup>765</sup> The explanatory memorandum to the proposal suggests that the Agency 'will monitor compliance with the Regulation by Member States through the monitoring mechanism, which the Commission proposed to establish in its revision of the mandate of the Agency'<sup>766</sup>, but nothing is said regarding the Agency's possible involvement in the actual functioning of the novel asylum border procedure.

### 7.2.2. A coordinated, effective and rapid screening phase

As we have seen in Chapter 5, the Screening Proposal aims to remedy the lack of streamlined procedures upon arrival and delays in accessing the appropriate asylum procedure through introducing what the Commission describes as a coordinated, effective and rapid screening phase in the EU immigration and asylum *acquis*.<sup>767</sup>

#### Effectiveness

In view of the problems encountered by migrants at the external borders of the EU, detailed rules on how Member States are to carry out checks on persons at external borders and ensure access to the asylum procedure for asylum seekers has European Added Value (EAV). In particular, detailed rules on how to deal with vulnerable migrants and on how to screen eligibility for a border procedure responds to structural problems encountered at external borders. This can be traced back to a lack of legal clarity as regards to the interplay of the Schengen Borders Code and the Asylum Procedures Directive, and obligations for Member States on the basis of the Refugee Convention.<sup>768</sup> Common rules on screening has EAV as it can ensure uniform use of the border procedure.<sup>769</sup>

With regard to the effectiveness of the screening as proposed in the Pact, one concern stands out in particular. Some of the **problems that the Screening Proposal intends to address are not caused by a lack of harmonised rules, but by the lack of effective implementation and application of existing rules.** For example, detailed rules on access to the asylum procedure are already contained in the current asylum *acquis*, which also requires Member States to identify applicants with special needs.<sup>770</sup>

Regarding the implementation gap, **it is unclear how the Screening Proposal can ensure that vulnerable cases are identified in practice,** as the Proposal does not require Member States to de-

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<sup>764</sup> Tsourdi, E., '[The New Pact and EU Agencies: an ambivalent approach towards administrative integration](#)', EU Migration Law Blog, accessed on 20 July, 2021.

<sup>765</sup> Ibid.

<sup>766</sup> [COM\(2020\)611 final](#), p. 12.

<sup>767</sup> European Commission, [SWD\(2020\)207](#), p. 69.

<sup>768</sup> EPRS, [Asylum procedures at the border](#), 2020.

<sup>769</sup> Ibid.

<sup>770</sup> The relevant rules should (and are) contained in the asylum *acquis*. See [Case C-808/18, Commission v Hungary](#) and the applicable provisions from Directive 2013/32.

brief on factors relating to vulnerability, or take specific decisions on account of identified vulnerabilities in the outcome of the screening.<sup>771</sup>

Another example for the lack of attention for implementation and application at Member State level is provided by the **lack of sustained reflection on the fiction of non-entry in the Pact**. The way in which non-entry relates to the physical presence of migrants on EU territory remains opaque. This, combined with the fact that **securing non-entry will generally require restrictions on liberty which qualify as detention in EU law**, means that the Screening Proposal does not achieve the desired legal clarity, nor will it likely contribute to relieving pressure on accommodation at external borders. By leaving the discretion to use detention up to the national laws of the Member States, it is likely to exacerbate existing problems with regard to de facto detention at the EU's external borders.<sup>772</sup>

Other concerns regarding effectiveness relate to mandatory health checks and screening within a given territory. **Health checks for persons arriving at external borders may have EAV, but their effectiveness is clearly limited if they only apply to third-country nationals who do not have the right to enter**. This is so because EU citizens and other third-country nationals coming from abroad may also be 'persons requiring isolation on public health grounds'.<sup>773</sup>

The EAV of screening of persons apprehended within the territory of the Member States is not clearly set out in the Pact

## Proportionality

**As was argued in Chapter 4, the choice for a Regulation is at odds with the fact that many crucial elements are left to the discretion of Member States**, most prominently the use of detention. This is an issue that has suffered from the lack of legal clarity over the past years,<sup>774</sup> and which the Pact aims to remedy.

More particular **proportionality concerns relate to the duration, modality and location of screening**. Regarding duration: it has been observed that five days of screening is excessive, as no registering of the application takes place beforehand. In cases of emergency, this duration may be extended by another five days.<sup>775</sup>

The modality of non-entry has been argued to strain the relationship with international refugee law and it is questionable whether the need to responding to 'mixed flows' justifies the blurring between asylum and irregular migration, which the Screening Proposal entails.<sup>776</sup>

The Proposal determines that the screening shall also be carried out within the territory of the Member States where there is no indication that third-country nationals have been subject to controls at external border. The wording of this provision suggests a reversal of the burden of proof

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<sup>771</sup> See Screening Proposal, COM(2020) 612 final, Articles 13 and 14.

<sup>772</sup> PROASYL, [Abgelehnt im Niemandsland](#), 2021.;

<sup>773</sup> EC Explanatory Memorandum [COM\(2020\) 612](#).

<sup>774</sup> EC, European Migration Network, '[Ad-Hoc Query on 'detention of asylum applicants at the border'](#)', 2015.; European Database of Asylum Law, '[Borders, Procedures and Rights at Rösztke: Reflections on Case C-924/19 \(PPU\)](#)', 2020.

<sup>775</sup> See Chapter 5, section 5.2.4.

<sup>776</sup> Jakulevičienė, L., '[Re-decoration of existing practices? Proposed screening procedures at the EU external borders](#)', EU Migration Law Blog, 2020. Accessed on 16 July, 2021.

for immigrants. It is not clear how Member States are to implement this obligation in view of domestic rule of law guarantees.<sup>777</sup>

## Coherence

**The regime for persons held at the border during the screening is not detailed.** It is only suggested that during the screening, persons concerned 'should be guaranteed a standard of living complying with the Charter of Fundamental Rights of the European Union and have access to emergency health care and essential treatment of illnesses'.<sup>778</sup>

How this relates with the Asylum Acquis, in particular for what concerns reception conditions, is not clearly specified. The Explanatory Memorandum suggests that the legal effects concerning the Reception Conditions Directive 'should apply only after the screening has ended'.<sup>779</sup>

On completion of the screening procedure, the authorities responsible shall fill the so called 'de-briefing form and refer the person concerned to the relevant procedure. **It is not clear how the outcome of the screening relates to refusal of entry and the Return Directive**'<sup>780</sup>.

### 7.2.3. A seamless asylum-return procedure and an easier use of border procedures

The proposal to introduce border procedures, to integrate asylum and return decisions and to limit appeals and their suspensive effect aims to remedy delays and slow processing of applications, difficulty in using the border procedure, and problems related to the asylum-return nexus.

## Effectiveness

According to the Commission, the data on the changing nature of migration flows to the EU suggests that the relevance of border asylum procedures will increase over time. Border asylum procedures are described as the most effective migration management tool when a large share of applicants are citizens of countries with a low recognition rate. Clear rules on border procedures in a Regulation may indeed have EAV, seeing that there are structural problems with regard to the implementation and application of the current border procedure provided in Article 43 APD.

**The pact does not provide clear answers to the most acute problems with regard to the current use of border procedures by the Member States.** Instead of solving the current implementation challenges of the CEAS, evidence suggests that border procedures increase detention of asylum seekers at the border, reducing the quality of the reception offered in frontline Member States.<sup>781</sup> The pact will likely aggravate these problems. First, the lack of clarity regarding to what extent the fiction of non-entry requires detention in both asylum and return border procedures is not solved by amended Asylum Procedures Regulation. Second, the pact does not make clear how pressure on accommodation at external borders can be addressed, apart from providing that border procedures may be conducted at other places. Moreover, mandatory use of

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<sup>777</sup> For example in the Netherlands, arrest or apprehension is only allowed on the basis of a reasonable suspicion of illegal entry or stay.

<sup>778</sup> Recital No. 27, [Regulation 2020/852](#).

<sup>779</sup> [COM\(2020\) 612 final](#), p. 5.

<sup>780</sup> Meijers Committee, '[CM1816 Comments on the proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals \(recast\), COM\(2018\) 634 final](#)', 2018; Violeta Moreno-Lax et al, [The EU Approach on Migration in the Mediterranean](#), IPOL, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, June 2021 p. 26.

<sup>781</sup> See EPRS, European Implementation Assessment, Border procedures, November 2021; and PROASYL, [Abgelehnt im Niemandsland](#), 2021.

the border procedure does not take due account of the differences amongst Member States, and it is in tension with research, which indicates that even in comparatively favourable conditions, border procedures come with severe deficiencies.

The proposed integration of asylum and return decisions and limits on appeals and their suspensive effect aim at preventing absconding, thus reducing unauthorised secondary movements and increasing the effectiveness of the return policy. We have pointed out in Chapters 2 and 3 that secondary movements remain poorly qualified and quantified by the Pact. Therefore, it is also **difficult to assess to what extent the stronger linkage of asylum and return procedures have EAV in countering secondary movements**. For what concerns the effectiveness of the return policy, the exclusive emphasis placed on the measures for preventing absconding is in contrast with existing evidence suggesting that an **effective and sustainable return policy largely depends on the capacity to incentivise the cooperation of the returnees rather than on coercion**<sup>782</sup>. The effectiveness of limiting appeals and merging the appeal procedure for asylum and return decisions within the border procedure may seem to contribute to swifter procedures, but observers have warned that it may not work in practice as it leaves too little room for national legal specificities. They have pointed out that in Member States that already apply this model such as Greece 'the limited one level of judicial appeal, brevity of judicial reasoning, and lack of automatic suspensive effect of appeal have not contributed to swifter asylum and return procedures, but to a series of fundamental rights violations found by the European Court of Human Rights.'<sup>783</sup>

## Proportionality

It is **difficult to assess the proportionality of the mandatory use of a border procedure in the absence of data on the quality of decision-making in border procedures**.<sup>784</sup> Generally, expert interviews have emphasised that the problems created by the backlog in the processing of asylum applications, yet they are equally concerned that speeding up processing will deprive individuals of a thorough review of their applications and wrongly refuse protection.<sup>785</sup> In view of the findings regarding effectiveness, the mandatory use of a border procedure is not proportionate when coupled to recognition rates, also in view of the wide differences in recognition rates across the EU<sup>786</sup>. Moreover, limiting procedural safeguards such as limiting the suspensive effect of appeals and excluding appeals in second instance as argued above leaves too little room for national procedural autonomy, as explained above.<sup>787</sup>

The remaining **proportionality concerns are related to the impact on the fundamental rights of the individuals subject to border procedures**. A longer duration of the border procedure may be beneficial for the quality of decision-making, but it also entails longer periods of detention, especially when coupled with the return border procedures (twelve weeks each, thus totalling 24 weeks). Grounds for detention in the return border procedure are extended without a clear explanation of why this would be necessary. While minors younger than 12 are excluded from the border procedure, the procedure's application to minors above 12 is difficult to justify. The impact on fundamental rights of limiting appeals cannot be said to be proportionate to the aims pursued. Lack of automatic suspensive effect in the particular context of a border procedure is in violation of

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<sup>782</sup> See discussion in Chapter 2.

<sup>783</sup> Moraru, M., '[The new design of the EU's return system under the Pact on Asylum and Migration](#)', EU Migration Law Blog, 2021.

<sup>784</sup> Cornelisse, G., Reneman, M. '[Border procedures in the Member States: Legal Assessment](#)'. External Research paper for European Parliament Research Service, 2020.

<sup>785</sup> Spain Country Research, Ecorys, 2021; Germany Country Research, Ecorys, 2021.

<sup>786</sup> See discussion in Chapter 2, section 2.2.1.

<sup>787</sup> See also EPRS, '[Substitute Impact Assessment proposed Return Directive](#)', 2020.

fundamental rights as argued in chapter 6, and hence cannot be justified in order to 'speed up' procedures.

## Coherence

Similar to the screening, the regime for persons held at the border during a return border procedure is not provided for by EU law. However, those who have expressed a wish to apply for international protection are applicants in the sense of the EU asylum acquis. Coherence with the Return Directive is ensured through a provision on the return border procedure in the latter instrument, but at the same time Member States are allowed to exclude persons in a return border procedure from the scope of the Return Directive.

## 7.3. A fairer and more comprehensive approach to solidarity

In the proposal for the RAMM, the Commission introduces a comprehensive and flexible solidarity mechanism, with the aim of ensuring that arrivals are handled by the EU as a whole.<sup>788</sup> The mechanism can be adjusted to the different migratory challenges faced by Member States, and solidarity contributions are widened beyond relocation of asylum seekers.<sup>789</sup>

### Effectiveness

The **solidarity mechanism** as proposed by the Commission is **not the outcome of a compromise on political disagreement between Member States but incorporates these very disagreements** in the legislative proposals. Thus, the new mechanism of solidarity in the RAMM gives Member States the possibility to opt-out from solidarity in the area of asylum (relocation) by contributing to solidarity through return sponsorships or capacity building. As a consequence, the RAMM does not appear to have clear benefits over Member State action in achieving the Treaty-based goal of a *common policy on asylum*. Instead, it reproduces the inadequate understanding of solidarity by the Member States in the legislative proposal itself. In other words, it only partially presents a common EU approach to a common problem.

**Return sponsorship** is aimed more at improving the effectiveness of returns than at establishing a system for sharing responsibility in the field of asylum. This has been judged to be a distortion of the idea of solidarity.<sup>790</sup> Moreover, the **relationship between solidarity and effective returns is not explained**. It is therefore difficult to review the objectives of the Pact on this point. Finally, the EAV of the obligation to transfer migrants after 8 months to the sponsoring Member State is not clear. We point out that this mechanism essentially 'formalises' secondary movements of irregular migrants.

The **complexity of the procedures for solidarity** in the RAMM most likely impacts negatively on the EAV of the mechanism. Such complexity does not improve legal clarity for those having to implement the rules. Administrative complexity is especially prevalent in solidarity contribution in search and rescue cases. The number of steps envisaged for adjusting and amending the solidarity contributions may delay, rather than contribute to, an effective response in search and rescue cases, therewith also multiplying the opportunities for political disagreement.

Whereas under previous proposals, solidarity was triggered automatically by an objective factor (asylum applications reaching a certain threshold), the RAMM envisions a **strong discretionary role**

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<sup>788</sup> European Commission, [SWD\(2020\)207](#), p. 9.

<sup>789</sup> See description in Chapter 5, section 5.3.

<sup>790</sup> [ECRE, Comments on the Commission Proposal for a Regulation on Asylum and Migration Management COM \(2020\) 610 2020/0279 \(COD\), 2020](#), p. 70.

**for the Commission.** It is the Commission which has to determine whether a situation of 'migratory pressure' or of 'crisis' exist, or whether a situation it is likely to generate recurring arrivals of third-country nationals in search and rescue cases. This is done after a complex qualitative assessment during which over 21 criteria must be taken into consideration. However, **the definitions of migratory pressure and crisis remain very broad and open to interpretation.**

### Proportionality

The scope of relocation has been reduced to generally exclude applicants for international protection subject to the border procedure. While this seems logical in view of the rationale for the border procedure, it also means that **relocation will not relieve pressure on the frontline Member States, especially now that the use of the border procedure becomes mandatory in certain cases.**

### Coherence

The main issue as regards coherence is **how return sponsorship relates to the Return Directive.** As suggested in Chapter 5, it is not entirely clear what happens after the transfer of the person to the sponsoring Member State after 8 months. Furthermore, the involvement of more than one Member State in preparing the return during the first 8 months may lead to complexities, in particular with assessing the lawfulness of coercive measures such as detention, which can only be used if removal is carried out with due diligence.

## 7.4. Simplified and more efficient rules for robust asylum and migration management

By introducing simplified and more efficient rules for sustainable sharing of responsibility for asylum applicants across the EU, the Pact aims to respond to the inefficiencies of the current Dublin system. In particular, the proposed measures are aimed at improving efficiency and effectiveness of procedures, limiting secondary or unauthorised movements and countering abuse, guaranteeing quick access to the examination procedure and protection for those in need of it.

### Effectiveness

In the previous attempts at reforming the Dublin system, an overhaul of the first country of irregular entry criterion was proposed, but it proved impossible to reach an agreement on this point. **The RAMM retains the first country of irregular entry criterion of the current Dublin system** extending its application also to persons disembarked after search and rescue operations.<sup>791</sup>

It is this criterion that has been found to cause the very problems that the Commission intends to address with the Pact by introducing a fairer and comprehensive approach to solidarity.<sup>792</sup> **By retaining this criterion, the EAV of the RAMM with regard to responsibility sharing in the area of asylum remains limited.**

The first country of irregular entry criterion is often justified with the need to encourage effective border controls. Evidence from the past twenty years of implementing this criterion suggests that it

<sup>791</sup> [COM\(2020\) 610 final](#), Article 21(2).

<sup>792</sup> ECRE, '[Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered](#)', 2008; Fratzke, S., '[Not Adding Up – The Fading Promise of Europe's Dublin System](#)', MPI Europe, 2015; Den Heijer, M., Rijpma, J., & Spijkerboer, T. (2016). '[Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System](#)', *Common Market Law Review*, p. 607-642.

has rather stimulated lax border controls or, even worse, illegal practices such as pushbacks.<sup>793</sup> **Extending the first country of irregular entry criterion to include persons disembarked after search and rescue operations will likely reinforce the perverse incentive for Member States to prevent arrivals.**

Limiting the cessation of responsibility clauses as well as the possibilities for a shift of responsibility between Member States due to the actions of the applicant is said to counter secondary movements and risk of absconding. However, **secondary movements are often directly related to conditions in the Member States and accommodation.**<sup>794</sup> These are not addressed in the Pact and, as argued above, pre-entry procedures (i.e. screening and asylum border procedures) may exacerbate existing problems in this area. In addition, **the responsibility of the first countries of entry will be further reinforced as a consequence of the amendments on the rules on cessation and shift of responsibility.**

### Proportionality

By reinforcing the first country of irregular entry criterion, the RAMM exacerbates the responsibility placed on frontline Member States. This raises proportionality concerns, as assuming that a 'responsibility for entry' exists in these cases is tantamount to attaching to Member States situated along EU external borders a kind of '**responsibility for geographical location**'.<sup>795</sup>

### Coherence

The first country of irregular entry criterion raises coherence issues with regard to the international legal framework on asylum. In particular, the UNCHR has noted that **it is 'wholly inappropriate' to derive any responsibility from the irregular entry of the TCNs.**<sup>796</sup> Quite the contrary, in the case of applicants for international protection, the Member State of first entry is rather complying with an international law obligation (non-refoulement).

## 7.5. A targeted mechanism to address extreme crisis situations

When it comes to crisis situations and situations of force majeure, the Pact aims at (1) introducing the necessary adaptation of the ordinary rules on pre-entry procedures and solidarity in order to ensure that Member States are able to address situations of crisis and force majeure; (2) introducing specific rules to offer effective protection of persons in need in situations of crisis.

### 7.5.1. Adaptation of rules to crisis situations

The crisis and force majeure regulation introduces derogations from the proposed Screening regulation and APR concerning the extension of the use and of maximum duration of the screening and of the border procedures.<sup>797</sup> It also introduces and targeted solidarity procedures and mechanisms to provide a quick response in circumstances demanding urgency<sup>798</sup>.

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<sup>793</sup> Hailbronner, K. & Thym, D., '[EU Immigration and Asylum Law. A Commentary](#)', Hart Publishing, 2016, p. 1493.

<sup>794</sup> See discussion in Chapter 2, section 2.2.2.

<sup>795</sup> Hailbronner, K. & Thym, D., '[EU Immigration and Asylum Law. A Commentary](#)', Hart Publishing, 2016, p. 1493.

<sup>796</sup> UNHCR, '[Revisiting the Dublin Convention](#)', 2001, p. 5.

<sup>797</sup> See Chapter 5, section 5.2.4.

<sup>798</sup> See Chapter 5, section 5.3.5.

## Effectiveness

As suggested in Chapter 3, the distinction between objectives and measures is ambiguous here. Enabling Member States to address crisis situations of situations of force majeure is a general objective, but what is to be achieved in those circumstances is not specified.

Allegedly, the specific aim of the Commission in this regard is that of ensuring procedural efficiency in exceptional situations. **To give Member States more time to complete pre-entry procedures in situations of crisis may seem logical, but this comes at the expense of proportionality.**

The **widened scope for relocation and shortened timeframes for triggering the compulsory solidarity mechanism in times of crisis have added value.** However, the concerns regarding the complexity of the procedure and the discretionary role of the Commission in triggering the procedure<sup>799</sup> remain valid here.

## Proportionality

Proportionality concerns emerge mainly on account of the far-reaching derogations to the maximum period for pre-entry procedures. In view of the fact that these procedures will most often imply detention, the **accumulated period for detention may amount up to 40 weeks plus ten days of screening.** The impact on migrants' and asylum seekers' fundamental rights are significant here and can hardly be justified on account of the need to ensure procedural efficiency.

## Coherence

The Pact introduces a separate instrument for crisis, but the legal basis for this instrument is identical to the legal bases for the instruments with regard to which it proposes derogations. **It is not clear how the establishment of a permanent mechanism to address crisis relates to Article 78(3) TFEU.**<sup>800</sup>

The definition of crisis in the crisis and force majeure regulation and the situations in which screening may be extended from a maximum duration of five days to ten are not identical.<sup>801</sup>

**It is not clear why a separate instrument is required.** Providing for derogations from the applicable EU acquis on asylum and return and setting out specific rules for the application of the solidarity mechanism is not immediately clear. The Commission does not explain clearly why these derogations or specific rules cannot be provided for in the relevant instruments themselves (RAMM, APR). A separate instrument may complicate procedures, and it reduces legal clarity for those who need to implement the rules.

## 7.5.2. Immediate protection

The crisis and force majeure regulation introduces rules for the granting of 'immediate protection' status in crisis situations.<sup>802</sup> This is done with the aim of both offering immediate protection to those fleeing a situation of danger and of temporarily relieving the pressure on the asylum system in the Member States of first arrival.

<sup>799</sup> See section 1.3 above.

<sup>800</sup> This provision provides a legal basis for the adoption of provisional measures by the Council, on a proposal from the Commission and after consultation with the Parliament, in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries.

<sup>801</sup> Confront Article 6(3), Screening Regulation and Article 1(2)(3), Crisis and Force Majeure Regulation.

<sup>802</sup> See Section 1.3 above, and Chapter 5, section 5.4.

## Effectiveness

With regard to the establishment of an immediate protection status, the **Regulation has clear EAV on account of the fact that it is for the Commission to decide when immediate protection should be granted**. According to many observers, this may facilitate the recourse to this instrument,<sup>803</sup> whereas in the past, the Temporary Protection Directive has never been used due to the 'cumbersome and lengthy activation procedure influenced by political factors'.<sup>804</sup>

Another critical point of the Temporary Protection Directive was the absence of clear and objective indicators of a mass influx.<sup>805</sup> The crisis and force majeure regulation seem to offer some improvement in this regard. Yet, as suggested, **the definition of migratory crisis still remains very broad and open to interpretation**. In particular, 'it is not clear, when exactly a Member State's asylum, reception or return system becomes non-functional; what does this return system include and why a dysfunction in the return system must be accepted as a relevant factor for granting persons in need of protection a group protection status'.<sup>806</sup>

## Proportionality

The proposal for establishing an immediate protection status does not raise proportionality concerns. In particular, the cost incurred by Member States in granting beneficiaries equal treatment with nationals of the Member States with regard to access to economic and social rights are compensated by the temporary relief of their asylum reception system.

## Coherence

Persons granted immediate protection will benefit from equivalent economic and social rights that subsidiary protection beneficiaries. Yet, the **personal scope of immediate protection is not fully aligned with the personal scope of subsidiary protection**.

## 7.6. A fairer and more effective system to reinforce migrants and asylum seekers' access to rights

Under this heading, the Commission identifies the objective of improving migrants and asylum seekers' access to rights. As already suggested in chapters 2 and 3<sup>807</sup>, it is **difficult to understand how this objective relates to specific problems migrants and asylum seekers encounter in accessing rights**. In particular, the Pact does not contain clear measures that address dire humanitarian conditions and *de facto* detention at external borders and it does not provide solutions for irregular migrants who cannot be returned to their countries of origin.

The SWD suggests that the main drivers behind the lack of a fair and effective system for migrants to access their rights are to be found in the lack of integrated approach for the pre-entry stage and in the inefficiencies of the Dublin system. Increased harmonization of the procedures upon entry and procedural efficiency of the mechanism for determining responsibility are thus described as the solution for addressing the problems related to migrants and asylum seekers access to rights. Yet,

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<sup>803</sup> Meijers Committee, '[Comments on the Migration Pact – Crisis and Force Majeure Regulation](#)', 2020, p. 4.

<sup>804</sup> European Commission, '[Study on the Temporary Protection Directive](#)', 2016. See also Migration Pact Impact Assessment interview with European Asylum Support Office, Ecorys, 2021, Ecorys.

<sup>805</sup> Hailbronner, K. & Thym, D., '[EU Immigration and Asylum Law. A Commentary](#)', Hart Publishing, 2016, p. 1067.

<sup>806</sup> Ineli-Ciger, '[What a difference two decades make? The shift from temporary to immediate protection in the new European Pact on Asylum and Migration](#)', EU Migration Law Blog, 2020. Accessed on 16 July, 2021.

<sup>807</sup> See in particular sections 2.2.4 and 3.6.

as discussed in chapter 6, many of the measures proposed to harmonise and speed up the different procedures have clear negative impacts on the protection of fundamental rights for individual migrants.<sup>808</sup> The paradox is thus that **measures that in fact limit rights and safeguards for migrants and asylum seekers are presented as improving their access to rights.**

Another problem is that measures intended at improving access to rights are not presented in a single instrument but scattered across different proposals. Identifying which measure is meant to realize this objective is therefore not straightforward.

According to our understanding, there are **two main measures genuinely aimed at improving migrants and asylum seekers' access to rights** in the Pact: (1) rules on the protection of the right to family reunification included in the RAMM; (2) the Fundamental rights monitoring mechanisms established by the Screening regulation. In the next two sections we analyse effectiveness, proportionality and coherence of these measures.

### 7.6.1. Protecting family unit

As discussed in section 5.3.1, the RAMM **extend the definition of 'family members'** currently included in Articles 9 and 10 of the Dublin III regulation. The aim is to extend the right to family unit also to sibling or siblings of an applicant, and to cover family relations which were formed after leaving the country of origin but before arrival on the territory of the Member State.<sup>809</sup> Also, in the case of dependent people and their family members with carer responsibilities, the RAMM includes families that are formed en route.<sup>810</sup>

#### Effectiveness

The widening of the notion of 'family members' has been met with the favour by numerous stakeholders.<sup>811</sup> However, the effectiveness of this amendment in improving access to the right to family unit largely depends on the rules on evidence necessary for establishing family ties. Strict evidentiary requirements have indeed long undermined the application of the family criteria.<sup>812</sup>

In order to allow for swifter family reunification, **the rules on evidence necessary for establishing responsibility are made more flexible in the RAMM.** In particular, formal proof of the existence of family ties (e.g. documentary evidence, or DNA testing) is no longer required 'in cases where the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility for examining an application for international protection'.<sup>813</sup>

Nonetheless, the judgment on the impact the proposed amendments may have in practice is mixed.<sup>814</sup> In the reduced time limit for submitting a 'substantiated' take-charge request<sup>815</sup> it may prove difficult to collect 'coherent, verifiable and sufficiently detailed' evidence on the existence of

<sup>808</sup> For example, limitations are proposed to the scope of the right to an effective remedy, the suspensive effect of appeals, and the right to material reception conditions. See Chapter 6, section 6.2 on fundamental rights impact.

<sup>809</sup> See Chapter 5, section 5.3.1.

<sup>810</sup> See Chapter 5, section 5.3.1.

<sup>811</sup> Maiani, F., [A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact](#), EU Migration Law Blog, 20 October 2020; ECRE, [Comments on the Commission Proposal for a Regulation on Asylum and Migration Management COM \(2020\) 610 2020/0279 \(COD\), 2020](#), p. 25.

<sup>812</sup> Peers, S., [EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law](#), Oxford Scholarship Online, August 2016, p. 300.

<sup>813</sup> [COM\(2020\) 610 final](#), Recital 49.

<sup>814</sup> Greece Country Research, Ecorys, 2021; ECRE, [Comments on the Commission Proposal for a Regulation on Asylum and Migration Management COM \(2020\) 610 2020/0279 \(COD\), 2020](#), p. 25.

<sup>815</sup> See Chapter 5, section 5.3.1.

family ties. **Procedural hurdles may therefore counterbalance the positive effects deriving from the widening of the notion of family members.**

### Proportionality

The RAMM still **excludes members of the household that existed in the country of origin** (e.g. adult children, or older parents living with their adult children), **and same-sex partners from the definition of family members.** While not explicitly stated, this is done with the aim of limiting the number of asylum applicants that are allowed to reunite with their relatives present in another Member State. The aim of reducing the number of secondary moves within the EU is not proportional to the limitation imposed on asylum seekers' right to family unit.

With regard to evidentiary requirements, proportionality concerns arise in relation with the obligation for the applicant to 'submit and substantiate orally or through the provision of documents' any relevant information that could help to establish the presence of family relations.<sup>816</sup> This provision may still create an **unreasonable burden of proof on individuals.**<sup>817</sup>

### Coherence

**In the case of dependent persons, the family relations covered are reduced to the parent-child relationship.** This is not coherent with the objective of improving access to the right to family unit, which is inexplicably restricted in relation to those who may need the support of relatives most. Also, in consideration of the complex dynamic of forced displacements, the exclusion of spouses and siblings has been judged as 'unnecessary cruel'<sup>818</sup> and 'legally untenable and inhumane'.<sup>819</sup>

## 7.6.2. Fundamental rights monitoring mechanism

Article 7 of the Screening regulation sets out the obligation for each Member State to establish an 'independent' monitoring mechanism for ensuring respect of fundamental rights during the screening, with particular regard to the prevention of arbitrary detention, the need to ensure access to asylum and due respect to *non-refoulement* principle.<sup>820</sup>

### Effectiveness

The monitoring system which the Screening regulation requires Member States to set up is a step in the good direction for addressing some of the problems related to the effective access to rights of migrants and asylum seekers, yet the framework proposed to ensure the well-functioning of the mechanism has been judged inadequate.<sup>821</sup>

A first concern relates with the **limited scope** of the mechanism. The vast majority of reported breaches of migrants' fundamental rights usually happens outside official border crossings points, transit zones, hotspot areas and reception facilities, especially when Member States cooperate with third countries in preventing arrivals (the so-called external dimension of migration control

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<sup>816</sup> [COM\(2020\) 610 final](#), Article 11(1)(d).

<sup>817</sup> ECRE, [Comments on the Commission Proposal for a Regulation on Asylum and Migration Management COM \(2020\) 610 2020/0279 \(COD\)](#), 2020, p. 25.

<sup>818</sup> *Ibid*, p. 31.

<sup>819</sup> Maiani, F., [A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact](#), EU Migration Law Blog, 2021.

<sup>820</sup> See Chapter 5, section 5.2.8.

<sup>821</sup> See European Council on Refugees and Exiles, Amnesty International, Danish Refugee Council, Human Rights Watch, International Rescue Committee, Oxfam, Refugee Rights Europe, Save the children, ['Joint statement: Turning rhetoric into reality. New monitoring mechanism at European borders should ensure fundamental rights and accountability'](#), 10 November, 2020.

policies).<sup>822</sup> The effectiveness of a monitoring mechanism covering only the screening stage is therefore likely to be limited.

A second concern relates with the **lack of independence** of the mechanism. It is for Member States to ensure that adequate safeguards are in place to guarantee the independence of the monitoring mechanism. Still there is no assurance that external bodies will be involved in its functioning. The participation of the 'relevant national, international and non-governmental organisations and bodies' is just optional.<sup>823</sup>

A final concern relates with the **absence of clear follow-up procedures** for responding to non-compliance of fundamental rights obligations reported by the mechanism. This is particularly worrying in light of the poor results achieved by the complaints mechanism established under Article 111 of the EBCG Regulation 2019/1986.<sup>824</sup>

## Proportionality

The proposal for establishing an independent fundamental rights monitoring mechanism does not rise proportionality concerns. The administrative effort required to Member States is justified by the primary relevance of the need to protect migrants and asylum seekers' fundamental rights.

## Coherence

The Recital no. 23 of the Screening proposal states that the newly created Fundamental rights monitoring mechanism should be without prejudice to the monitoring of fundamental rights provided for Frontex activities in Regulation (EU) 2019/1896. No coordination is established with the monitoring mechanisms established by the proposal on the future EUAA.

**It is not entirely clear if this implies that the proposed monitoring mechanisms will cover the action of national authorities alone or also that of EU agencies** involved in the screening procedure. In light of the limitations of existing procedures for monitoring fundamental rights compliance during EU agencies' deployment,<sup>825</sup> an extension of the scope of the Monitoring Mechanism would be needed. In particular, such an extension would compensate for the lack of transparency of the rules on the suspension and/or termination of Agencies' operational activities in cases of concerns for the respect of migrants and asylum seekers fundamental rights arise.<sup>826</sup>

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<sup>822</sup> Moreno-Lax, V., [EU External Migration Policy and the Protection of Human Rights](#), EP DROI subcommittee, 2020.

<sup>823</sup> [COM\(2020\) 612 final](#), Art. 7(2), last subparagraph.

<sup>824</sup> Carrera, S., and Stefan, M., [Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective remedies for victims of human rights violations?](#), CEPS Paperback, Brussels, 2018.

<sup>825</sup> Fink, M., [Frontex and Human Rights: Responsibility in 'multi-actor Situations' Under the ECHR and EU Public Liability Law](#). Oxford University Press, 2018; Horii, S., [Accountability, dependency, and EU Agencies: the hotspot approach in the refugee crisis](#). *Refugee Survey Quarterly*, 37(2), 2018, p. 204-230.

<sup>826</sup> According to the EBCG Regulation, it is for the Agency's Executive Director to decide on the suspension or termination of an operational activity when there are violations of fundamental rights or international protection obligations of a 'serious nature' (article 46(4), EBCG Regulation). This decision is taken in 'consultation' with the Agency's Fundamental rights officer and be based on 'duly justified grounds' (article 46(4), EBCG Regulation), still a significant discretion is left to the Executive Director in assessing the situation on the ground. Similar rules will also apply to the new European Union Agency for Asylum (see article 18(5) of the interinstitutional agreement reached on the proposed Regulation on the European Union Agency for Asylum [Council of the European Union, Interinstitutional File: 2016/0131(COD), 17 June 2021]).

## 7.7. Conclusions

In many reports and data on the CEAS, lack of harmonisation seems to be the main problem that needs to be tackled. In the new pact, most emphasis lies on harmonising procedures and not on the substance of the CEAS (i.e. differences in recognition rates, differences in benefits, differences in access to the labour market, differences in accommodation are not addressed).<sup>827</sup> Together with the fact that implementation on national level is insufficiently addressed in the pact and that significant discretion is retained at Member State level, precisely with regard to the aspects of CEAS that are most problematic, it is doubtful whether the pact can remedy the problems and gaps identified.

In particular, the extension of pre-entry procedures (both in scope and duration) with regard to the current rules raises the question of whether the pact presents common solutions for common problems. Seeing that persons who are subject to non-entry procedures are physically present on the territory of frontline States, these measures do not solve the problem of national reception systems that are subject to disproportionate pressure. Instead, they may exacerbate these problems.

The need for reform of the solidarity and responsibility-sharing mechanisms of the CEAS is evident. However, the pact does not put forward a truly common solution to a common problem. Instead, political disagreement over solidarity is replicated in the proposed legislation. Therefore, the EAV of the proposed solutions by the pact in this area is limited.

The pact largely fails to put forward solutions for current problems with regard to the protection of migrants and asylum seekers' fundamental rights. The pre-entry stage is likely to exacerbate the problems related with the extensive recourse to measures limiting migrants' and asylum seekers' personal liberty. In addition, the independent monitoring mechanism envisaged by the screening regulation is unlikely to have a significantly positive impact on the protection of fundamental rights during border controls. According to some of the experts interviewed, the pact seems to look at migration and asylum from the short-term perspective of emergency management rather than from the long-term perspective of integration policies. They have argued that the EU should commit itself to a more human rights-oriented border control policies, abandoning the securitised approach to migration and asylum that prevails in the pact.

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<sup>827</sup> Integration measures remain a competence of the MS (see 79 TFEU).

## 8. Monitoring and evaluation of the new pact on migration and asylum

### Key findings

- The new pact remains very vague and unclear with regard to the concrete implementation of monitoring and evaluation measures. While some of the proposals of the new pact specify reporting requirements, they do not specify concrete evaluation criteria or indicators;
- Furthermore, it is not clear from the new pact how Member States who do not comply with the monitoring and reporting requirements and do not deliver the required data sets for example, would be sanctioned;
- The SWD refers to the intention of the Commission to strengthen monitoring and evaluation mechanisms and make more frequent use of infringement procedures. Still, it is not evident how and when this process would be activated;
- The new pact, alongside the SWD, also mentions more regular self-reporting (with contributions from EU Member States) and requests for detailed and regular reports from the DG HOME agencies, Frontex, Europol and EASO. While an increased reporting obligation from the agencies, which goes hand in hand with their acquired additional powers, might help to increase the efficiency and effectiveness of the new pact, these new requirements do not solve the ongoing issues of the CEAS as outlined in Section 8.1, especially the lack of data from Member States;
- In order to solve these issues, legislative changes might be needed to force the Member States to comply with reporting obligations under the new pact. Otherwise, delays and the lack of data observed during the CEAS are likely to persist.

### 8.1. Introduction

According to the Better Regulation Guidelines Tool #41, 'monitoring is a continuous and systematic process of data collection about an intervention. It generates factual information for future evaluation and impact assessments and helps identify actual implementation problems. Monitoring is necessary to allow policy-makers and stakeholders to check if policy implementation is 'on track' and to generate information that can be used to evaluate whether it has achieved its objectives.'<sup>828</sup>

While monitoring looks at **what** changes have occurred since the entry into force of a policy intervention, evaluation looks at **whether** the intervention has been effective in reaching its objectives, and whether the objectives have been met efficiently, as well as the reasons for the success of an intervention.<sup>829</sup>

### 8.2. Current situation: Monitoring and evaluation under CEAS

When compared to other fields of EU law, the Commission's monitoring and enforcement of the CEAS has been limited. The CEAS has yet to be evaluated. In addition, although several instances of EU law violations have occurred, infringement proceedings have only been used on a few occasions. One of these occasions was on 10 October 2019, when the European Commission issued a reasoned opinion to Hungary concerning the Member State's failure to provide food for individuals held in

<sup>828</sup> Better Regulation TOOL #41. [MONITORING ARRANGEMENTS AND INDICATORS](#).

<sup>829</sup> Ibid.

transit zones at the Hungarian-Serbian border.<sup>830</sup> These transit zones were also the subject of Case 808/18, in which the European Commission brought an action before the Court of Justice on the basis of Article 258 TFEU on 21 December 2018. The Court ruled that Hungary had failed its obligations under a large number of provisions of the asylum acquis and the Return Directive, all read in conjunction with Articles 6, 18 and 47 of the Charter.<sup>831</sup> In many other cases, softer measures such as political dialogue were the instrument of choice, which, in many cases, resulted in little to no change in the behaviour of the concerned governments.<sup>832</sup>

In addition, desk research shows that, at present, **two main** issues persist in the Monitoring and Evaluation of the CEAS:

### 8.2.1. Lack of data, resulting in lack of monitoring compliance with the acquis

In a 2019 report, ECRE notes that 'for effective monitoring of compliance to take place, a **number of conditions** need to be in place. First, up-to-date and reliable quantitative and qualitative evidence must be available. Statistics are one of many forms of evidence.'<sup>833</sup> However, at present, Eurostat does not provide extensive or timely data on various key measures of the CEAS, including Dublin III. In addition, 'only a handful of countries<sup>834</sup> regularly release figures on the activities of their Dublin Units.'<sup>835</sup> Although EASO does provide relevant Member State data on the functioning of CEAS on a national level, it cannot, due to a lack of mandate, assess 'whether or not countries respect their obligations.'<sup>836</sup> Consequently, due to a lack of data, the Commission is unable to fully monitor and evaluate the current implementation and status of CEAS' legal instruments on an EU- as well as a national level.

### 8.2.2. Failure to evaluate the CEAS legal instruments

As noted in the CEAS, the compliance of Member States with their respective legal obligations in the area of asylum and migration must be analysed on a regular basis. DG HOME, representing the Commission, has the institutional right and responsibility to do so. However, as noted by ECRE, 'the evaluation report on the Dublin III and recast Eurodac Regulations due by July 2018 has not yet been delivered to the Council and European Parliament (EP). Similarly, evaluation reports on the recast Asylum Procedures and Reception Conditions Directives, due by July 2017, have not been issued despite express requests from the EP'.<sup>837</sup> In addition, reports indicate that the Commission has yet to fully clarify the functioning of so-called 'hotspots', including their (legal) compliance with the asylum acquis.<sup>838</sup>

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<sup>830</sup> European Council on Refugees and Exiles, [Hungary: Commission Takes Next Step Regarding Non-provision of Food in Transit Zones](#), 2019.

<sup>831</sup> Case 808/18, *Commission v Hungary*, ECLI:EU:C:2020:1029.

<sup>832</sup> Migration Pact Impact Assessment interview with o DG Migration and Home Affairs, Ecores, 2021.

<sup>833</sup> [Making the CEAS work, starting today](#), European Council on Refugees and Exiles, 2019, p. 3.

<sup>834</sup> These countries are Greece, Germany, Luxembourg, Poland, and Switzerland.

<sup>835</sup> Ibid.

<sup>836</sup> Ibid. p. 3.

<sup>837</sup> ECRE, [Making the CEAS work, Starting Today: ECRE'S Identification of Key Implementation Gaps in the CEAS and recommendations for EU measures to make the Common European Asylum System function effectively](#), 2019, p. 3.

<sup>838</sup> [The implementation of the Common European Asylum system](#), European Parliament, 2016, p. 11.

## 8.3. Proposed M&E measures new pact on migration and asylum Legislative Measures

### 8.3.1. Monitoring and Evaluation Measures

The extent to which Monitoring and Evaluation (M&E) mechanisms are present in the new pact's legislative measures as presented by the Commission varies significantly between the measures. As shown in Table 8.0-1, whilst the screening regulation and the Regulation on Asylum and Migration (AMR) do mention M&E, such mechanisms are not present in the Amended Asylum Procedure Regulation (APR) or in the Crisis and Force Majeure. None of the four legislative measures present indicators for M&E purposes.

Table 8.0-1 – M&E measures present in four of the new pact's legislative measures

Legislative measure	<i>screening regulation</i> <sup>839</sup>	<i>Amended Asylum Procedure Regulation (APR)</i> <sup>840</sup>	<i>Regulation on asylum and migration management (AMR)</i> <sup>841</sup>	<i>Crisis and Force Majeure</i> <sup>842</sup>
M&E mechanisms present	<p>After three years after entry into force: Report on the implementation of the measures set out in the screening regulation.</p> <p>Every five years: Commission must conduct an evaluation of the screening proposal.</p> <p>No specific indicators mentioned.</p>	<p>No inclusion of specific provision on evaluation and/or monitoring;</p> <p>No specific indicators mentioned.</p>	<p>18 months of its entry into force, and from then on annually, 'the Commission shall review the functioning of the measures set out in Chapters I.</p> <p>After 3 years 'the Commission shall report on the implementation of the measures set out in' RAMM.</p> <p>No sooner than [five] years after the date of application of [RAMM], and every five years thereafter, the Commission shall carry out an evaluation of this Regulation'.</p> <p>No specific indicators mentioned.</p>	<p>No inclusion of specific provision on evaluation and/or monitoring.</p> <p>No specific indicators mentioned.</p>

Source: Ecorys, 2021.

<sup>839</sup> COM(2020) 612 final, 2020/0278 (COD).

<sup>840</sup> COM(2016) 467 final 2016/0224(COD).

<sup>841</sup> COM(2020) 610 final 2020/0279(COD).

<sup>842</sup> COM(2020) 613 final 2020/0277(COD).

## 8.4. Non-legislative measures

### 8.4.1. Recommendation on an EU mechanism for Preparedness and Management of Crises related to Migration (migration preparedness and crisis blueprint)<sup>843</sup>

The recommendation calls for **regular monitoring activities of the migration situation at the operational level** to ensure that 'decisions [are] taken on the basis of a full situational picture wherever possible'<sup>844</sup> both in the monitoring and preparedness stage and during the crisis management stage.<sup>845</sup> This requires Member States to **'provide timely and adequate information in order to establish the updated migration situational awareness.'**<sup>846</sup> Practically, this monitoring of the migration situation process should build on the regular ISAA reports.<sup>847</sup> Further, 'the migration preparedness and crisis blueprint should [...] **help to prepare the annual migration management report** issued by the Commission in accordance with Article 6 of the proposal for a regulation on asylum and migration management.'<sup>848</sup> While this is not directly linked to monitoring and evaluation activities in the classical sense, these monitoring activities nonetheless support operational decision-making in the first place and inform reporting, the availability of which might serve to enable reviews of decision-making processes at a later stage.

### 8.4.2. Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admissions and other complementary pathways<sup>849</sup>

This recommendation addresses monitoring activities several times in relation to the monitoring of the implementation of EU resettlement schemes in 2020 and 2021. It is recommended that Member States should, upon request, **report to the Commission the number of people resettled on their territory** in line with the pledges they made and specify the country from which each person has been resettled.<sup>850</sup> In addition to this, the document indicates that in addition to the information received by Member States, 'the Commission will also monitor the various projects and programmes for humanitarian admission implemented in the Member States to maintain an overview of all legal pathways for those in need of international protection and the number of places offered through these channels.' To this end, Member States should also **'keep the Commission informed of admissions through humanitarian admission schemes** and other complementary pathways.'<sup>851</sup>

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<sup>843</sup> Commission Recommendation (EU) [2020/1364](#) of 23 September 2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways.

<sup>844</sup> Ibid, para 4, p.1.

<sup>845</sup> Ibid, para 4, p.1.

<sup>846</sup> Ibid, paralbid, para 4, p.4.

<sup>847</sup> Ibid, para 4, p.4.

<sup>847</sup> Ibid, para 4, p.4.

<sup>848</sup> Ibid, paralbid, para 15, p.3

<sup>849</sup> Ibid.

<sup>850</sup> Ibid, para Ibid, para 38, p.6, para 26, p.9.

<sup>851</sup> Ibid, paralbid, para 27, p.9.

### 8.4.3. Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities<sup>852</sup>

This recommendation refers to an interdisciplinary **Contact Group**, which the Commission will establish with the purpose of providing a forum 'in which Member States can cooperate and coordinate activities in order to implement [other aspects laid out in] this Recommendation.'<sup>853</sup> Cooperation and liaison activities should also include private entities who own or operate vessels carrying out search and rescue activities.<sup>854</sup>

In terms of monitoring and evaluation activities, 'the **Contact Group will monitor the implementation of the Recommendation and issue, once a year, a report to the Commission.**'<sup>855</sup> Member States should also 'provide the Commission with any relevant information on the implementation of this Recommendation, at least once a year, by 31 March of the year following the reference year.'<sup>856</sup> This information will be taken into account by the Commission in the development of 'the European asylum and migration management strategy and the annual Migration Management Reports set out in the asylum and migration management regulation, as appropriate. On this basis, the Commission will also assess and recommend future initiatives, as needed.'<sup>857</sup>

### 8.4.4. Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence<sup>858</sup>

Reference made to past evaluations: 2017 comprehensive evaluation of the Facilitators Package<sup>859</sup> (p.1) and follow up activities, such as the **Commission's launch of a regular consultation process with civil society and EU agencies 'to build up knowledge and gather evidence in order to identify the issues linked to interpreting and applying the Facilitation Directive.'**<sup>860</sup> This applied particularly to the context of the possible criminalisation of humanitarian assistance in the context of facilitating non-EU country nationals' transit into or through an EU country.

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<sup>852</sup> Commission Recommendation (EU) [2020/1365](#) of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities.

<sup>853</sup> Ibid, paralbid, para 16, p. 3-4.

<sup>854</sup> Ibid, paralbid, para 2, p.4.

<sup>855</sup> Ibid.

<sup>856</sup> Ibid, paralbid, para 3, p.4.

<sup>857</sup> Ibid, paralbid, para 17, p.4.

<sup>858</sup> [Communication](#) from the Commission Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence 2020/C 323/01.

<sup>859</sup> Ibid, plbid, p.1.

<sup>860</sup> Ibid.

## 8.5. M&E measures in reforms

### 8.5.1. EU Asylum Agency Regulation<sup>861</sup>

In June 2021, it was announced that an agreement was reached on the transformation of EASO into a new EU Asylum Agency (EUAA).<sup>862</sup> The 2016 proposal forms the basis of on-going negotiations. Thus, relevant monitoring and evaluation measures for the purpose of this section will be drawn from it, although measures might ultimately change in the course of the negotiations.

For one, an enhanced mandate of EASO as EUAA is envisioned to entail a monitoring mechanism, which should 'assess compliance with the CEAS and other key tasks such as the provision and analysis of country of origin information, operating the distribution key of the Dublin system and intervening in support of Member States in emergency situations or where the necessary remedial action would not have been taken.'<sup>863</sup> In the 2016 proposal, this is linked to the principles of subsidiarity and proportionality, whereby the objective of the Proposal is for the EUAA to, among others, 'monitor the operational and technical application of Union law and standards' related to asylum matters and to follow up on and provide assistance where necessary, such as in cases of disproportionate pressure on national asylum and reception systems.<sup>864</sup>

Explicit mention of monitoring, evaluation and reporting arrangements is made, in that the **EUAA 'must draw up an annual activity report on the situation of asylum**, in which it needs to evaluate the results of the activities it carries out throughout the year. The report must **contain a comparative analysis of the Agency's activities** so that the Agency may improve the quality, consistency and effectiveness of the CEAS. **The Agency must transmit that annual activity report to the Management Board, the European Parliament and the Council.**<sup>865</sup> Further, 'the Commission **must commission an evaluation within three years of entry into force of this Regulation, and then every five years thereafter**, to assess particularly the impact, effectiveness and efficiency of the Agency and its working practices. That evaluation must cover the Agency's impact on practical cooperation on asylum-related matters and on the CEAS. The Commission must send the evaluation report together with its conclusions on the report to the European Parliament, the Council and the Management Board. The findings of the evaluation must be made public.'<sup>866</sup>

### 8.5.2. Reception Conditions Directive

A proposal for a recast of the Asylum Reception Conditions Directive was published in 2016, on which a provisional agreement was reached in 2018. The Commission indicated support for the adoption of the Directive as part of the new pact and published a provisional compromise text in October 2020. The latter entails actions relating to guidance, monitoring and control systems in

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<sup>861</sup> European Commission. [Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation \(EU\) no 439/2010](#). COM(2016) 271 final. 2016/0131 (COD). Brussels, 4 May 2016.

<sup>862</sup> European Commission. [New Pact on Migration and Asylum: Agreement reached on the new European Union Agency for Asylum](#), Brussels, 29 June 2021.

<sup>863</sup> European Commission. [New Pact on Migration and Asylum: Agreement reached on the new European Union Agency for Asylum](#), Brussels, 29 June 2021, chapter 1, p. 2.

<sup>864</sup> European Commission. [New Pact on Migration and Asylum: Agreement reached on the new European Union Agency for Asylum](#), Brussels, 29 June 2021, chapter 2, p. 4.

<sup>865</sup> European Commission. [New Pact on Migration and Asylum: Agreement reached on the new European Union Agency for Asylum](#), Brussels, 29 June 2021, chapter 5, p. 6.

<sup>866</sup> European Commission. [New Pact on Migration and Asylum: Agreement reached on the new European Union Agency for Asylum](#), Brussels, 29 June 2021, p. 6.

Article 27. According to this, **'Member States shall, with due respect to their constitutional structure, put in place relevant mechanisms in order to ensure that appropriate guidance, monitoring and control of the level of reception conditions are established.** Member States shall take into account available, non-binding [operational standards on reception conditions and indicators developed by the European Asylum Support Office/ and any other reception conditions operational standards, indicators, guidelines or best practices established in [the finalised EU Asylum Agency Regulation]'.<sup>867</sup> **Member States' reception systems shall also be subject to the monitoring mechanism, which will be set out in the finalised EU Asylum Agency Regulation** (see above). Further, Article 30 of the compromise text states that 'by [three years after the entry into force of this Directive] at the latest, and at least every five years thereafter, the Commission shall present a report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary. Member States shall at the request of the Commission send the necessary information for drawing up the report by [two years after the entry into force of this Directive] and every three years thereafter.'<sup>868</sup>

### 8.5.3. Qualification Directive

The Qualification Directive was proposed alongside the Reception Conditions Directive in 2016. Like the Reception Conditions Directive, a provisional agreement was reached in 2018. However, progress stalled following disagreement among political representatives in COREPER. The 2016 proposal contains provisions on monitoring, evaluation and reporting arrangements, whereby 'the Commission shall report on the application of this Regulation to the European Parliament and to the Council within two years from its entry into force and every five years after that. **Member States shall be required to send relevant information for drafting that report to the Commission and to the European Union Agency for Asylum.** The Agency will also be monitoring compliance with this Regulation by Member States through the monitoring mechanism which the Commission proposed to establish in its revision of the mandate of the Agency.'<sup>869</sup> The Commission will propose necessary amendments to the Regulation, where appropriate, on this basis. Member States shall provide the Commission with all information required to prepare the report to the European Parliament and the Council nine months before the report is due.<sup>870</sup>

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<sup>867</sup> Council of the European Union. [Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection \(recast\) – conditional confirmation of the final compromise text with a view to agreement](#). Brussels, 18 June 2018, article 27, para 1, p.78.

<sup>868</sup> Council of the European Union. [Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection \(recast\) – conditional confirmation of the final compromise text with a view to agreement](#). Brussels, 18 June 2018, article 30, p. 81.

<sup>869</sup> European Commission. [Proposal for a Regulation of the European Parliament and of the council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents](#). Brussels, 13 July 2016, chapter 5.

<sup>870</sup> European Commission. [Proposal for a Regulation of the European Parliament and of the council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents](#). Brussels, 13 July 2016, article 43.

#### 8.5.4. Union Resettlement Framework<sup>871</sup>

In 2016, the Commission proposed a regulation establishing a Union Resettlement Framework in the context of two ad hoc resettlement programmes that started between 2015-2017. The 2016 proposal addresses evaluation and review of the framework, whereby **'[t]he Commission shall report on the application of this Regulation to the European Parliament and to the Council in due time for the review of this Regulation.'**<sup>872</sup> The timing of the review should be linked to the evaluation and review cycles set out in the Asylum, Migration and Integration Fund Regulation (516/2014) to maintain close links between the two regulations. Further, **'Member States shall provide the Commission and [the European Union Agency for Asylum] with the necessary information for drawing up its report'** for the purpose of paragraph 1 in addition to the information provided to [the European Union Agency for Asylum] on the number of third-country nationals and stateless persons effectively resettled on a weekly basis as laid down in Article 22(3) of [the Dublin Regulation].<sup>873</sup> This information 'shall feed into the [above-mentioned] evaluation.'<sup>874</sup>

#### 8.5.5. Return Directive

The Directive on common standards and procedures in Member States for returning illegally staying third-country nationals entered into force in 2009.<sup>875</sup> In 2018, however, a Proposal for the Recast of the Return Directive was put forward.<sup>876</sup> The 2008 text refers to monitoring only in an operational context, whereby **'Member States should be able to rely on various possibilities to monitor forced return'<sup>877</sup> and should 'provide for an effective forced-return monitoring system'<sup>878</sup> to this end. In terms of reporting, 'the Commission shall report every three years to the European Parliament and the Council on the application of this Directive in the Member States and, if appropriate, propose amendments.'<sup>879</sup> The reporting cycle was scheduled to commence in December 2013 and take into account several pre-defined elements in particular. The 2018 Recast retains the monitoring of forced returns aspects and addresses implementation plans, monitoring, evaluation and reporting arrangements insofar that it states **'the Commission shall report on the****

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<sup>871</sup> European Commission. [Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation \(EU\) No 516/2014 of the European Parliament and the Council, COM/2016/0468 final – 2016/0225 \(COD\)](#). Brussels, 13 July 2016.

<sup>872</sup> European Commission. [Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation \(EU\) No 516/2014 of the European Parliament and the Council, COM/2016/0468 final – 2016/0225 \(COD\)](#). Brussels, 13 July 2016, chapter 5c.

<sup>873</sup> European Commission. [Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation \(EU\) No 516/2014 of the European Parliament and the Council, COM/2016/0468 final – 2016/0225 \(COD\)](#). Brussels, 13 July 2016, article 18 (2).

<sup>874</sup> European Commission. [Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation \(EU\) No 516/2014 of the European Parliament and the Council, COM/2016/0468 final – 2016/0225 \(COD\)](#). Brussels, 13 July 2016, chapter 5c.

<sup>875</sup> [Directive 2008/115/EC](#) of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

<sup>876</sup> European Commission. [Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals \(recast\)](#). Brussels, 12 September 2018.

<sup>877</sup> [Directive 2008/115/EC](#) of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, para 13, p. 99.

<sup>878</sup> [Directive 2008/115/EC](#) of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, article 8, para 6, p. 103.

<sup>879</sup> [Directive 2008/115/EC](#) of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, article 19, p. 106.

**application of this Directive to the European Parliament and to the Council within three years from its entry into force and every three years thereafter;** in that occasion, the Commission may propose any amendments that are deemed necessary.<sup>880</sup>

### 8.5.6. M&E measures in the staff working document

Monitoring and evaluation measures are mentioned in a few passages throughout the staff working document. In the Section on governance and implementation it is stated 'the Commission will [...] prepare a report on preparedness and contingency, based on Member State reporting on an annual basis'.<sup>881</sup> A determining factor for trust is in EU and national policies are furthermore seen 'in implementation, requiring enhanced monitoring and operational support by EU Agencies. This includes more systematic Commission monitoring of both existing and new rules, including **through infringement procedures**'.<sup>882</sup>

The Commission is planning to establish a system of quality control related to management of migration, such as the Schengen evaluation mechanism and the European Border and Coast Guard Agency. According to the Commission (**Frontex**) **vulnerability assessments**, will play a key role.

Another important step will be the future **monitoring of the asylum systems** included in the latest compromise on the **Proposal for a new European Union Agency for Asylum**. The new mandate would respond to Member States' growing need for operational support and guidance on the implementation of the common rules on asylum, as well as bringing greater convergence. It would boost mutual trust through new monitoring of Member States' asylum and reception systems and through the ability for the Commission to issue recommendations with assistance measures. This legislation should be adopted still this year to allow this practical support to be quickly.

Under the Section on 'Stepping up the effectiveness of EU external border', Frontex's yearly **vulnerability assessments** are mentioned as important to assess 'the readiness of Member States to face threats and challenges at the external borders and recommending specific remedial action to mitigate vulnerabilities'.<sup>883</sup> The vulnerability assessments have a twofold purpose: First, they are meant to **complement the evaluations under the Schengen evaluation mechanism, carried out jointly by the Commission and the Member States**. Second, the vulnerability assessments will also be meant to target the Agency's operational support to the Member States to best effect.<sup>884</sup>

Under the Section 'A well-functioning Schengen area', the Schengen evaluation mechanism is mentioned, as 'an essential tool for an effective Schengen area, building trust through verifying how Member States implement the Schengen rules'. With regard to sanctioning regimes, it is stated that the Commission will more systematically consider the launching of infringement procedures.<sup>885</sup>

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<sup>880</sup> European Commission. [Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals \(recast\)](#). Brussels, 12 September 2018, chapter 5.

<sup>881</sup> SWD, p.6.

<sup>882</sup> SWD, p.11.

<sup>883</sup> European Court of Auditors. [Special Report: Frontex's support of external border management: not sufficiently effective to date](#). 08. Luxembourg, July 2021.

<sup>884</sup> SWD, p. 11.

<sup>885</sup> SWD, p. 14.

## 8.6. Assessment of the Monitoring and Evaluation Mechanisms

### 8.6.1. Legislative Proposals

#### screening regulation

Although the measures allow for some level of monitoring and evaluation of the **Screening Proposal** as part of the new pact, it entails various ambiguities that stand to hinder an adequate level of oversight for the Commission, as well as the EP, the Council and the EESC. More specifically, it is **unclear what indicators or sources of information** the report on the implementation of the Screening Proposal must be based on. Similarly, Article 20 states that Member State must provide 'all relevant information' to be used for the report evaluating the Proposal every five years but fails to specify what information is necessary. In turn, it is unclear how Member States are expected to provide such support without knowing in advance what information will be required of them.

#### APR Regulation

As with the monitoring and evaluation measures envisioned for the Screening Proposal, the above-noted stipulations under Article 60 allows for some oversight of the border procedures pertaining to the new pact. However, the **lack of specified indicators** or information needed from Member States for the production of the Commission's evaluation is lacking. The Amended Proposal on Border Procedures stands to have a potential impact on human rights and access to asylum. As a result, a specific review mechanism of mandatory border (asylum and return) processes, similar to the 18 months review mechanism envisioned for the proposed Solidarity Mechanism (see below), would be highly beneficial.

#### AMR

Similar to the ambiguities present in the Commission's proposed monitoring and evaluation measures for the Screening Proposal and the Amended Proposal on Border Procedures, the measures envisioned for RAMM **fail to specify which indicators will apply** for the above-noted report or which 'necessary information' Member States may be asked to provide.

#### Crisis and Force Majeure

This is disputable, as it is still necessary to assess whether the proposed measures have responded effectively to crisis situations.

### 8.6.2. Non-legislative proposals and reforms

While the Member States are asked to support the Commission with regular and up-to-date migration statistics and have other reporting obligations to support the reporting activities of the Commission, it remains unclear how the Commission intends to sanction Member States who do not comply with these requirements. In the SWD, the more systematic Commission monitoring of both existing and new rules, including through infringement procedures, is mentioned twice. However, it remains clear what the clear application criteria procedure for infringements would be. Similar to the legislative proposals, the non-legislative proposals and reform proposals do not describe indicators which would help to measure the success of the proposed evaluation measures.

## 8.7. Proposed Indicators

In the Proposal to reform the Schengen evaluation and monitoring mechanism the following key issues and shortcomings with regard to monitoring and evaluation:<sup>886</sup>

- The excessive length of the evaluation process (10-12 months) and the time for Member States to implement recommendations (2 years);
- Insufficient capacity of Member States to contribute an adequate number of experts for the evaluations, with 5 Member States providing one third of all experts and with chronic deficit of experts in specific policy fields;
- Suboptimal use and efficiency of unannounced visits as well as of the other evaluation and monitoring tools, in particular, thematic evaluations;
- Slow follow-up and implementation of the action plans and lack of a comprehensive and consistent approach to monitoring the implementation; and
- Apart from the evaluation of the right to protection of personal data, the assessment of the respect for fundamental rights in the implementation of the Schengen acquis is not sufficiently integrated in the Mechanism.

The above-mentioned Proposal to reform the Schengen evaluation and monitoring mechanism provides useful indicators to assess whether the monitoring and reporting requirements of the proposed new pact on migration and asylum are sufficient. The Proposal intends to: (1) increase the strategic focus of the Mechanism and **ensure a more proportionate use of the different evaluation tools**; (2) **shorten and simplify the procedures to make the process more effective and efficient, and increase peer-pressure**; (3) **optimise the participation of Member State experts and the cooperation with Union bodies, offices and agencies**; and (4) **strengthen the evaluation of the respect for fundamental rights under the Schengen acquis**. In order to achieve this, different measures will be used, for example, ensuring that there are no gaps when evaluating the implementation of the Schengen acquis in a Member States, strengthening the forms and methods of evaluation and monitoring activities and introducing significant acceleration of the evaluation process, with clear procedural deadlines.

Furthermore, the Proposal suggests strengthening the cooperation with Frontex, eu-LISA, Europol, the European Union Agency for Fundamental Rights, and the European Data Protection Supervisor. This way, the Commission would then be able to obtain a wider variety of information and risk analysis products from the bodies and agencies. Hence, the European Commission would not only rely on the cooperation of Member States but would be able to diversify its input-base with regard to data and information relevant for monitoring and evaluation.

Based on the indicators presented in the Schengen evaluation proposal and the in light of the current issues with the CEAS, the study team is presenting the following list of indicators that might be useful to strengthen the monitoring and evaluation further.

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<sup>886</sup> Proposal for a COUNCIL REGULATION on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) No 1053/2013, [COM\(2021\) 278](#) final.

Table 8.0-2 – Proposed monitoring objectives and indicators for baseline M&E scenario

Specific Objectives	Operational Objectives	Monitoring Indicators
SO-1: To minimise administrative burden for relevant stakeholders (e.g. Member States, EU-agencies and EU-bodies) in regards to M&E activities.	<p>M&amp;E procedures are shortened and simplified to make the process more effective, efficient, and less burdensome for relevant stakeholders (e.g. Member States, EU Agencies, EU bodies);</p> <p>Relevant stakeholders (e.g. Member States, EU Agencies, EU bodies) have clear guidelines as to what data/information is required for e.g. M&amp;E reports;</p> <p>Relevant stakeholders (e.g. Member States, EU Agencies, EU bodies) have clear guidelines as to when data/information is required for e.g. M&amp;E reports;</p> <p>Relevant stakeholders (e.g. Member States, EU Agencies, EU bodies) have clear guidelines as to how data/information should be collected, processed and presented for e.g. M&amp;E reports;</p> <p>Relevant data/information is increasingly recorded, collected, processed, verified, presented and shared electronically.</p>	<p>Time spent recording, collecting, processed, verified, presented and shared relevant data/information;</p> <p>Confirmation of administrative cost reduction by stakeholders;</p> <p>Amount of relevant data/information that is recorded, collected, processed, verified, presented and shared electronically.</p>
SO-2: To improve enforcement of applicable EU-level migration and asylum-related policies among relevant stakeholders (e.g. Member States, EU-agencies and EU-bodies).		<p>Number of violations identified relating to breaches of relevant policies/regulations;</p> <p>Number of inspections undertaken by relevant authorities;</p> <p>Confirmation of overall efficiency improvement by relevant authorities;</p> <p>Number of infringement proceedings actioned by relevant authorities (e.g. the Commission).</p>
SO-3: To increase acceptance of applicable M&E procedures inherent to EU-level migration and asylum-related policies among relevant stakeholders (e.g. Member States, EU-agencies and EU-bodies).	<p>Relevant stakeholders (e.g. Member States, EU Agencies, EU bodies) are willing to share relevant data/information for the purpose of e.g. M&amp;E;</p> <p>A more proportionate use of the different evaluation tools and procedures;</p> <p>Optimise the participation of and cooperation among relevant</p>	<p>Number of independent monitoring mechanisms and procedures (set up at e.g. national Member State level) to ensure that fundamental and procedural rights are safeguarded throughout stakeholders' application of relevant policies;</p> <p>Availability and volume of relevant data/information presented by relevant stakeholders (e.g. Member States, EU Agencies, EU bodies).</p>

Specific Objectives	Operational Objectives	Monitoring Indicators
	stakeholders (e.g. Member States, EU Agencies, EU bodies); Strengthen the understanding and respect for the importance of M&E among relevant stakeholders (e.g. Member States, EU Agencies, EU bodies).	

Source: Ecorys, 2021.

## 8.8. Conclusion

The new pact remains unclear with regard to the concrete implementation of monitoring and evaluation measures. While some of the proposals of the new pact specify reporting requirements, they do not specify concrete evaluation criteria or indicators. Furthermore, it is not clear from the new pact how Member States who do not comply with the monitoring and reporting requirements and, for example, do not deliver the required data sets would be sanctioned. The SWD refers to the intention of the Commission to strengthen monitoring and evaluation mechanisms and make more frequent use of infringement procedures. Still, it is not evident how and when this process would be activated. The new pact, alongside the SWD, also mentions more regular self-reporting (with contributions of EU Member States) and requests for detailed and regular reports from the DG HOME Agencies, Frontex, Europol and EASO. While an increased reporting obligation from the agencies, which goes hand in hand with their acquired additional powers, might help to increase the efficiency and effectiveness of the new pact, these new requirements do not solve the on-going issues of the CEAS as outlined in Section 1.1, especially the lack of data from Member States.

In order to solve these issues, legislative changes might be needed to force the Member States to comply with reporting obligations under the new pact. Otherwise, delays and the lack of data observed during the CEAS are likely to persist.

An alternative avenue to achieve more transparency and compliance with regard to monitoring and evaluation, researchers have advocated further increasing the legal powers of the DG HOME agencies. However, it remains arguable whether the agencies already meet the democratic accountability requirements to be vested with even more executive powers.

## 9. Conclusions

We conclude that the pact's objectives are not adequately articulated, and that clear criteria for evaluating the effectiveness of EU action are lacking. This is especially true when it comes to improving procedural efficiency, reducing secondary moves, and preventing asylum system abuse or exploitation. Given the existing implementation issues, the choice of regulations (APR, RAMM, screening proposal, and crisis instrument) as a legal instrument is understandable. However, it fails to recognise that implementation is not the same as transposition. Furthermore, allowing Member States substantial discretion on key issues such as the use of detention in the proposed regulations conflicts with the reason for the use of regulations, which is the absence of an integrated European strategy.

Obligatory screening at external borders, mandatory asylum processes, and mandatory return border procedures are the key changes proposed by the pact in terms of pre-entry procedures. The fact that people are not legally allowed to enter a country distinguishes these procedures. The pact, on the other hand, offers no justification for the fiction of non-entry. It also fails to go into detail on how non-entry will be enforced. Non-entry in pre-entry processes, according to interviewees, will suggest an excessive use of detention. The pact's silence on this subject is problematic, given the substantial documentation of de facto detention in border procedures.

Moreover, the debriefing form that national authorities need to prepare is costly and benefits could not be quantified due to lack of data. The data that would need to be collected for EASO do not seem to exceed current data requirements to monitor the CEAS. The cost of monitoring human rights could not be estimated due to a lack of specific information on what monitoring is required. However, it should be noted that the EU's mandated border procedures and minimum reception conditions provide net advantages of almost €500 million for all countries by speeding up the procedures.

Significant negative implications on fundamental rights and also territorial dimensions are expected, which are unlikely to be offset by positive effects. Non-governmental organisations have expressed concern about the new pact's possible detrimental impacts on safe routes for migrants and asylum seekers, claiming that it would make territorial access to the EU more difficult for migrants and asylum seekers. As a result, their reliance on irregular and/or illegal routes, as well as their susceptibility to criminal activities and networks, may increase.

While acknowledging that existing receiving facility standards vary significantly between and within Member States, officials from international NGOs and national governments have expressed concern that the new pact may have a negative impact on local populations. The uncertainty between the legal fictions of non-entry and detention, prolonged periods of custody, and the absence of the suspensive impact of appeals in asylum border are disturbing processes.

On a positive note, some Member State leaders and non-governmental organisations have stated that the new pact's planned reallocation and solidarity measures may have a beneficial influence on family reunification. However, it is uncertain if the new regulations on family reunification stand to increase the number of successful take-charge petitions. This could boost the currently small number of asylum seekers relocated from their initial country of entry to another country for family reasons.

### 9.1. Conclusion: What are the most pressing problems?

In this report, we have critically reviewed problems and related drivers as identified by the Commission, and we have pointed out additional challenges on the basis of desk research and the

interviews conducted in preparation for this study. Below, we briefly point out what we believe to be the **two most pressing problems characterising the current CEAS**.

The first is **the lack of a fair and effective system for migrants and asylum seekers to access their rights**. While this problem also features in the Commission's analysis put forward in the SWD, it was mainly presented as a consequence of the **lack of an integrated approach at EU level**. The main stakeholders<sup>887</sup> and the existing academic literature<sup>888</sup> suggest instead that the main drivers behind this problem are to be found in the **absence of legal pathways** for asylum seekers to reach EU territory and in the **inadequate implementation** (transposition and application) of the CEAS. The driver of inadequate implementation concerns in particular, the existence of **significant discrepancies** across Member States in the **quality of reception conditions (including detention), length of asylum procedures, and recognition rates**, as well as regards **possibilities for integration** in European societies.

The second most pertinent problem is related to the perceived lack of a **fair system for allocating responsibility between Member States**. This problem was also raised by experts from the southern Member States, who all agreed that the **Dublin system and the absence of a structural solidarity mechanism** resulted in excessive pressure placed on the reception and asylum systems of these Member States.<sup>889</sup> Government representatives from two northern Member States – Germany and Sweden – identified imbalances produced by the current system, which are aggravated by the lack of political will on the part of some Member States in accepting their designated quota of asylum seekers.<sup>890</sup>

With regard to identifying the driver for this latter problem, crucial differences exist between the main stakeholders and the academic literature on the one hand and the European Commission on the other. While the Commission sees the main drivers in the **procedural inefficiencies** of the current Dublin system and in the **absence of legal tools to offer solidarity beyond relocation**, our analysis shows that main stakeholders and the academic literature offer a different diagnosis. In particular, existing evidence suggests that the main problems lie in the **overall design of the Dublin system**, in particular concerning the prevalence of the **first country of irregular entry** criterion, the **lack of consideration for asylum seekers' preferences in the determination of the Member State responsible**, and the lack of a common understanding of the scope and content of the principle of solidarity and fair sharing of responsibility.

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<sup>887</sup> Migration Pact Impact Assessment interview with Meijers Committee, Ecorys, 2021; Migration Pact Impact Assessment interview with Red Cross EU, Ecorys, 2021; Migration Pact Impact Assessment interview with IOM, Ecorys, 2021.

<sup>888</sup> EPRS, [The Cost of Non-Europe Report in Asylum Policy](#), 2018.

<sup>889</sup> Migration Pact Impact Assessment Country Research for Greece on the basis of desk research and interviews with IOM Greece and the Greek Ministry of Migration and Asylum, Ecorys, 2021 Country Research; Migration Pact Impact Assessment Country Research for Spain on the basis of desk research and an interview with the Comisión Española de Ayuda al Refugiado (CEAR), Ecorys, 2021 Country Research; Migration Pact Impact Assessment Country Research for Italy on the basis of desk research and interviews with the Italian Ministry of Labour and Social Affairs, Immigration Directorate, Borderline Sicilia and Italian Refugee Council (CIR), Ecorys, 2021. Country Research.

<sup>890</sup> Migration Pact Impact Assessment Country Research for Sweden on the basis of desk research and interviews with the Swedish Ministry of Justice, the Swedish Migration Agency and the Swedish Refugee Law Centre, Ecorys, 2021; Country Research, Migration Pact Impact Assessment Country Research for Germany on the basis of desk research and interviews with the German Federal Ministry of the Interior, the German Red Cross and the Jesuiten Flüchtlingsdienst Deutschland, Ecorys, 2021. Country Research.

## 9.2. Review of the objectives

When reviewing the objectives of the pact, we found that its **objectives are not well defined and that clear criteria for evaluating the effectiveness of EU action are lacking**. This is especially true with regard to achieving procedural efficiency, countering secondary movements, and preventing abuse or misuse of the asylum system. Reviewing the objectives of the pact is complex because the Commission does not make a clear distinction between objectives and measures.

The objective of a fairer and effective system to strengthen migrants' and asylum seekers' rights is obvious. In general terms, it corresponds to the difficulties migrants face in exercising their rights under EU law.

There is, however, no clear justification for combining this objective with the additional objective of 'speeding up' procedures. Moreover, there is a lack of detail on how this objective relates to the specific human rights challenges faced by migrants and asylum seekers, such as continued violations of international law in the context of SAR and at external borders and Member State non-compliance with existing rules of the CEAS, as set out in Chapter 1. In a more general sense, **it is unclear how the other objectives of the pact** (most pertinently countering secondary movements and preventing the abuse of the asylum procedure) **relate to the implementation gap of the CEAS as a whole** (therewith including differences in recognition rates), as described in Chapter 1.

## 9.3. Subsidiarity and proportionality assessment

The EU **shares competence** in the field of immigration and asylum with Member States. Most of the problems that the new pact aims to address are **cross-border by nature** and cannot be addressed by the Member States alone. Therefore, the **EU has a right to act**. However, the cross-border nature of some of the problems that the new pact aims to remedy is **not always sufficiently qualified or quantified**. This is in particular the case for secondary movements, the abuse of the asylum procedure and mixed flows. Our analysis in this chapter thus fits with our findings on objectives in Chapter 3, in that we observed there that these objectives are not well developed in relation to the problems.

Especially in view of the lack of an integrated approach and persistent implementational issues with regard to the CEAS, the **need for and the European added value of reforming the CEAS is evident**. The choice of regulations (APR, RAMM, screening proposal and crisis instrument) as a legal instrument is understandable against the background of current problems of implementation. However, it overlooks that **implementation cannot be equated with transposition**. Moreover, leaving **significant scope for Member State discretion** on crucial points, such as the use of detention, in the proposed regulations sits uneasily with the justification for the choice of regulations – the lack of an integrated European approach.

In addition, proportionality concerns are raised by **administrative and procedural complexity** introduced by the four proposals, which in turn may hinder the **achievement of an integrated European approach**. For the Commission, proportionality 'means delivering [...] ambitious policies in the simplest, least costly way and avoiding unnecessary red-tape. It is about carefully matching the intensity of the proposed measure with what is to be achieved'. As this study shows, the **matching exercises** required for giving expression to solidarity, the transfer procedures under the responsibility sharing mechanism and the return sponsorship, introduce a degree of administrative complexity of which it is difficult to argue that it lives up to this standard.

With regard to the **legal bases of the proposed instruments**, we found that those are adequate except for the screening proposal. Article 77 (2)(b) TFEU is not an adequate legal basis for the

mandatory screening of persons apprehended within the territory of the Member States, seeing that such internal screening is not a measure concerning the checks to which persons crossing external borders are subject. Moreover, as the RAMM gives expression to the new pact's 'overarching principles of solidarity and a fair sharing of responsibility', the legal basis of this instrument would be **bolstered by a reference to Article 80 TFEU**. This may be complicated due to the lack of consensus amongst the institutions on whether Article 80 is a legal basis provision. This lack of consensus is in itself indicative of the political disagreements over solidarity in the EU.

## 9.4. Analysis of the main elements of the new pact on migration and asylum

In this report, we analysed four elements of the CEAS where the pact introduces significant changes: namely (1) **pre-entry procedures** at external borders; (2) **mechanisms for responsibility sharing and solidarity**; (3) a **mechanism for crisis and force majeure** and (4) the **governance mechanism** in the area of asylum and immigration.

The main novelties that the pact proposes with regard to pre-entry procedures are mandatory screening at external borders, mandatory asylum procedures and return border procedures. These procedures are characterised by the fact that persons **are not legally authorised to enter the territory**. The pact, however, does **not provide a rationale for the fiction of non-entry**. Neither does it elaborate on the way in which non-entry is to be ensured. Interviewees have expressed concern that **non-entry in pre-entry procedures will imply excessive use of detention**. The silence of the pact on this point is difficult to justify, seeing that instances of de facto detention in border procedures have been documented extensively. In addition, until recently, the Commission has been of the view that **border procedures imply detention**.

In times of crisis, cumulated pre-entry procedures may last for extended periods of time (a total of 290 days). As they can be applied to persons coming from countries with a recognition rate of 75 % or less, they will most **certainly affect persons who have a high likelihood of being refugees or qualifying for subsidiary protection**. Similarly, **limitations to the right to remain** during appeal procedures in a border procedure may affect the majority of applicants in times of crisis.

New rules on **mechanisms for responsibility sharing and solidarity** are contained in the RAMM. This legal instrument is to replace the Dublin system of responsibility sharing. Moreover, it introduces **solidarity as a structural component** of the CEAS. Currently, solidarity is as an outcome of case-by-case decision-making by the Council. In the RAMM, solidarity is seen as a corrective mechanism to the functioning of the ordinary rules on the attribution of responsibility.

The RAMM retains the first country of entry criterion and therefore does not address the problems that frontline Member States encounter. Moreover, the new rules on responsibility in the RAMM are even expected to reinforce the responsibility of first countries of entry, as they have no limit on the retention of responsibility of these Member States of first entry. The widening of the notion of 'family members' and increased flexibility in the rules on the evidence necessary for establishing responsibility are intended to facilitate family reunification and thus **contribute to countering secondary movements**.

**Mandatory solidarity** is only activated for search and rescue (SAR) cases, in cases of 'migratory pressures' or a 'situation of crisis'. Even in these cases, however, there are no assurances that a significant number of asylum seekers will be relocated. In particular, Member States **may avoid relocation by choosing to offer solidarity in different ways**. The procedures for solidarity give rise to heavy administrative burdens.

Return sponsorship is one of the ways in which Member States may offer solidarity instead of relocation. Under return sponsorship, it is not entirely clear what happens after the relocation of the person concerned. In particular, it is unclear if the Member State where the person is relocated shall issue a new return decision or if, in case of detention, the maximum length set by the Return Directive may be cumulated.

With regard to governance, the principle of integrated policy-making entails enhanced monitoring and operational support offered to Member States by EU agencies. Nevertheless, the new pact does not alter the legal mandate of EU agencies in any significant way.

## 9.5. Impacts of the pact

The proposed new pact stands to have **impacts on all dimensions analysed. Significant negative impacts are expected on the fundamental rights and territorial dimensions, which are not clearly balanced by positive impacts.** In particular, NGOs have raised concerns about the new pact's potential negative impact on safe pathways for migrants and asylum seekers, arguing that the new pact will make it more difficult for migrants and asylum seekers to secure territorial access to the EU. In turn, this may enhance their dependency on irregular and/or illegal routes and exposure to criminal activity and networks.

Given the mandatory nature of pre-entry screening and border procedures under the new pact, **the number of people forcibly kept in border regions may increase significantly.** Related proposals will likely have repercussions on the reception system of frontline Member States, potentially enhancing territorial unbalances by concentrating large reception facilities at the EU's external borders. Agreeing that the current standards of reception facilities vary greatly between as well as within Member States, representatives from international NGOs and national authorities have also suggested that the new pact may have a detrimental impact on local communities. We also found that **overall, pre-entry procedures have a negative impact on fundamental rights.** Particular concerns stand out on account of the ambiguity between the legal fiction of non-entry and detention, extended periods of time spent in detention and the exclusion of suspensive effect of appeals in asylum border procedures.

From an economic perspective, **the new EU definition of 'safe' countries as those from which less than 20 % are recognized combined with reduced deadlines and the limitation of appeals in the mandatory border procedures achieves benefits of up to €500 million at the EU level by returning rejected asylum seekers faster** (without increasing the rate of return). The necessity to replace open reception centres with closed centres to comply with the non-entry fiction, as well as the reduced possibility of secondary movements during required border procedures, are among the impacts with significant cost and benefit changes. According to the non-entry fiction, closed welcome centres must be created to replace open centres. Additional expenditures are incurred due to the necessity for minimum reception conditions and the cost of a debriefing form that national authorities must prepare. All Member States bear these expenses, but frontline and preferred destination countries suffer their effects.

**The mechanism on solidarity and responsibility sharing will not fully facilitate the territorial redistribution of migrants within the EU, nor alleviate the pressure on the asylum system of frontline Member States.** In particular, the solidarity mechanism envisaged by the RAMM will not be able to compensate for the distributive imbalances created by the new rules on allocation of responsibility. This, in particular, is a consequence of the fact that the system offers Member States many avenues to avoid being forced to relocate an asylum seeker on their territory. Return sponsorship is financially the most attractive for Member States other than the frontline Member States, thus their likely choice. However, it forces countries of first entry to process the asylum

application despite a lack of capacity. If the lack of processing capacity forces countries of first entry to suspend the asylum procedure, the lack of reception capacity in those countries becomes even more pronounced. In this respect, it is worth highlighting that return sponsorships may also have a negative impact on the fundamental rights of irregular migrants.

**The RAMM is expected to reinforce the first country of irregular entry criterion even further.** Allocation of responsibility to Member States of first entry is explicitly extended to people disembarked following SAR operations. It is likely that the effect of such a change will be to further incentivise frontline Member States to prevent arrivals by cooperating with third countries of transit and/or origin.

More positively, several Member State representatives and NGOs have noted that **the reallocation and solidarity mechanisms proposed under the new pact may have positive impacts on family reunification.** However, it remains unclear if the new rules on family reunification will increase the number of successful take-charge requests, boosting the currently very limited number of asylum seekers transferred from Member States of first entry to other Member States on account of family reasons.

## 9.6. Effectiveness and proportionality of the pact

We found that available data on the CEAS, as well as stakeholder interviews, confirm that **a lack of uniform application of EU rules seems to be the main problem that needs to be tackled.** In the pact, most emphasis lies on harmonising procedures and not on the substance of the CEAS (i.e. it does not address differences in recognition rates, differences in benefits, differences in access to labour market, differences in accommodation). Together with the fact that implementation on national level is insufficiently addressed in the pact, as implementation is not limited to transposition, and that significant discretion is retained at Member State level, precisely with regard to the aspects of CEAS that are most problematic, it is doubtful whether the pact can remedy the problems and gaps identified.

In particular, the extension of pre-entry procedures (both in scope and duration) with regard to the current rules raises the question of whether the pact presents common solutions for common problems. Seeing that persons who are subject to non-entry procedures are physically present on the territory of frontline States, these measures do not solve the problem of national reception systems that are subject to disproportionate pressure. Instead, they may exacerbate these problems.

The need for reform of the solidarity and responsibility-sharing mechanisms of the CEAS is evident. However, **the pact – by introducing an 'a la carte regime' concerning solidarity contributions and by retaining the first country of irregular entry criterion – does not put forward a truly common solution to a common problem.** Instead, political disagreement over solidarity is replicated in the proposed legislation. Therefore, the EAV of the proposed solutions by the pact in this area is limited.

**The pact largely fails to put forward solutions for current problems with regard to the protection of migrants and asylum seekers' fundamental rights.** While the pre-entry stage is likely to exacerbate the problems related with the extensive recourse to detention, the independent monitoring mechanism envisaged by the screening regulation does not do enough to address violations of fundamental rights during border controls. According to some of the experts interviewed, the pact seems to look at migration and asylum from the short-term perspective of emergency management, rather than from the long-term perspective of integration policies.

## 9.7. Monitoring and evaluation of the migration pact

The new pact **remains very vague and unclear with regard to the concrete implementation of monitoring and evaluation measures**. While some of the proposals of the new pact specify reporting requirements, they do not specify concrete evaluation criteria or indicators. Furthermore, it is not clear from the new pact how Member States who do not comply with the monitoring and reporting requirements and do not deliver the required data sets, for example, would be sanctioned.

The SWD refers to the **intention of the Commission to strengthen monitoring and evaluation mechanisms and make more frequent use of infringement procedures. Still, it is not evident how and when this process would be activated**. The new pact, alongside the SWD, also mentions more regular self-reporting (with contributions from EU Member States) and requests for detailed and regular reports from the DG HOME agencies, Frontex, Europol and EASO. While an increased reporting obligation from the agencies, which goes hand in hand with their acquired additional powers, might help to increase the efficiency and effectiveness of the new pact, these new requirements do not solve the on-going issues of the CEAS as outlined in Section 1.1, especially the lack of data from Member States.

In order to solve these issues, **legislative changes might be needed to force the Member States to comply with reporting obligations** under the new pact. Otherwise, delays and the lack of data observed during the CEAS are likely to persist.

An alternative avenue to achieve more transparency and compliance with regard to monitoring and evaluation researchers have advocated to even **further increase the legal powers of the DG HOME agencies**. However, it remains arguable whether the agencies already meet the democratic accountability requirements to be vested with even more executive powers.

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## Annex A. Overview of interviewed stakeholders

Country	Organisation	Function	Name of the interviewee(s)	Interviewed by Ecorys staff member	Date and time of interview (CET)
<b>European Commission</b>					
EU	DG Migration and Home Affairs	Head of Unit Directorate C, Unit C3: Asylum	Henrik Nielsen	Alexandra Schmid Suzan Sidal Anna Sarasibar	31 May 2021, 16:30-17:30
EU	European Asylum Support Office (EASO)	Senior Advisor to the Executive Director	Alexander Sorel	Alexandra Schmid Anna Sarasibar	8 June 2021, 13:00-14:00
EU	European Border and Coast Guard Agency (Frontex)	EU Affairs Strategic Advisor	Richard Ares Baumgartner	Alexandra Schmid Suzan Sidal Anna Sarasibar	9 June, 14:00-15:00
EU	Fundamental Rights Agency (FRA)	Programme Officer - Legal Research		Alexandra Schmid Suzan Sidal Anna Sarasibar	24 June 2021, 13:00-14:00
<b>EU Member States (selected case study countries)</b>					
Germany	German Red Cross (NGO)	Legal Officer Asylum		Paula Heckenberger	2 June, 11:00 – 12:00
Germany	Jesuit Refugee Service Germany	Assistant Director and Senior Policy Officer		Paula Heckenberger	4 June, 10:00
Germany	Ministry of Interior Federal Office for Migration and Refugees German National Police Ministry of Social Affairs			Alexandra Schmid	25 June, 15:30-17:00

Country	Organisation	Function	Name of the interviewee(s)	Interviewed by Ecorys staff member	Date and time of interview (CET)
Greece	IOM Greece	Chief of Mission, Project Manager	Gianluca Rocco, Simona Moscarelli	Zinovia Panagiotidou Alexandra Schmid	5 May, 10:00-11:00
Greece	Ministry of Migration and Asylum	Anonymous	Anonymous	Zinovia Panagiotidou	19 May, 11:00-12:30
Greece	Asylum Service (Ministry of Migration and Asylum)	Head of Asylum Processes and Training Department	Efharis Mascha	Zinovia Panagiotidou	16 July, 14:30-15:30
Italy	Italian Refugee Council (NGO)	Anonymous	Anonymous, Anonymous	Federica Genna	12 May, 15:00-16:00
Italy	Borderline Sicilia (NGO)	Anonymous	Anonymous	Federica Genna	12 May, 11:00-12:00
Italy	Ministry of Social Policies and Labour		Giada Geraci Giovanni Di Dio	Federica Genna	11 May, 11:00-12:00
Poland	Polish Migration Forum (NGO)	President of the Polish Migration Forum	Agnieszka Kosowicz	Katarzyna Lubianiec	11 May, 13:00 – 14:00
Poland	Halina Niec Legal Aid Center	President of the Halina Niec Legal Aid Center	Katarzyna Przybyśławska	Katarzyna Lubianiec	20 May, 15:00 – 16:30
Poland	Ministry of Interior and Administration	Representatives of the Department of International Affairs	Anonymous	Katarzyna Lubianiec	19 May, 10:00 – 12:00
Poland	Office for Foreigners	Department of Social Communication and Information	Anonymous	Katarzyna Lubianiec	Written exchange of communication
Poland	Headquarters of the Border Guard	Information Protection Office	Anonymous	Katarzyna Lubianiec	Written exchange of communication
Spain	Comisión Española de Ayuda al Refugiado (CEAR)		Nuria Ferré	Alexandra Schmid Jan Wynarski	6 May 11:00 – 12:00

Country	Organisation	Function	Name of the interviewee(s)	Interviewed by Ecorys staff member	Date and time of interview (CET)
Spain	Cruz Roja Española		Raquel Fernández Gibaja, María Jesús Picón Fraile	Jan Wynarski	24 June 13:00 – 14:00
Sweden	Ministry of Justice	Deputy Head of Unit at the Division for Migration and Asylum	Johanna Peyron	Anna Sarasibar	1 May, 13:00-14:00
Sweden	Swedish Migration Agency	Migration Expert	Bernd Parusel	Alexandra Schmid Anna Sarasibar	10 May, 15:30-16:30
Sweden	Swedish Refugee Law Centre (NGO)		Sara Jonsson	Alexandra Schmid Anna Sarasibar	11 May, 12:00-13:00
<b>EU level Civil Society Organisations (CSOs)</b>					
	Caritas Europe		Shannon Pfohman	Suzan Sidal	7 May 2021, 11:30-12:30
	European Council on Refugees and Exiles (ECRE)	Director	Catherine Woollard	Alexandra Schmid Suzan Sidal Anna Sarasibar	8 June 2021, 10:30-11:30
	Impartial and humanitarian organisation			Suzan Sidal	7 June 2021, 10:00-11:00
	EuroMed Rights; or UGTT (Union Générale Tunisienne du Travail); or the Tunisian Human Rights League; or Terre d'Asile Tunisie			Suzan Sidal	17 May 2021, 10:00-11:00
	Platform for International Cooperation on				11 June 2021, 10:00-11:00

Country	Organisation	Function	Name of the interviewee(s)	Interviewed by Ecorys staff member	Date and time of interview (CET)
	Undocumented Migrants (PICUM)				
	Red Cross EU Office			Suzan Sidal Anna Sarasibar	21 May
<b>Think tanks</b>					
	EUI Migration Policy Centre (MPC)	Professor and Director of the MPC	Andrew Geddes	Alexandra Schmid Anna Sarasibar	18 May 2021, 14:00-15:00
	Meijers Committee	Executive Director	Willem Hutten	Alexandra Schmid Anna Sarasibar	19 May, 10:00-11:00
	Seefar	Founder and Director	Jacob Townsend	Alexandra Schmid Anna Sarasibar	3 June 2021, 14:00-15:00

Source: Ecorys, 2021.

## Annex B. Country Research summary

### B.1 Overview of interviewees

#### Stakeholder Interviewee overview Sweden

Name of the interviewee	Representing organisation	Interviewed by Ecorys staff member	Date and time of interview
	Ministry of Justice	Anna Sarasibar	7 May, 2021 / 13:00
	The Swedish Migration Agency	Alexandra Schmid / Anna Sarasibar	10 May, 2021 / 15:30
	The Swedish Refugee Law Center	Alexandra Schmid / Anna Sarasibar	11 May, 2021 / 14:00

#### Stakeholder Interviewee overview Spain

Name of the interviewee	Representing organisation	Interviewed by Ecorys staff member	Date and time of interview
Nuria Ferré	Comisión Española de Ayuda al Refugiado (CEAR)	Alexandra Schmid/ Jan Wynarski	6 May 2021 11:00 CET
Raquel Fernández Gibaja/ María Jesús Picón Fraile	Cruz Roja Española	Jan Wynarski	24 June 2021 13:00 CET

#### Stakeholder Interviewee overview Italy

Name of the interviewee	Representing organisation	Interviewed by Ecorys staff member	Date and time of interview
Giovanni di Dio Giada Geraci	Ministry of Labour and Social Affairs, Immigration Directorate	Federica Genna, Consultant Security & Justice, Ecorys	11 May 2021, 11:00 CET
Anonymous	Borderline Sicilia		12 May 2021, 11:00
Anonymous Anonymous	Italian Refugee Council (CIR)		13 May 2021, 15:00

#### Stakeholder Interviewee overview Germany

Name of the interviewee	Representing organisation	Interviewed by Ecorys staff member	Date and time of interview
Anonymous	Deutsches Rotes Kreuz	Paula Heckenberger	2.6.2021, 12:00-13:00
Anonymous	Jesuiten Flüchtlingsdienst Deutschland	Paula Heckenberger	4.6.2021, 9:30-10:00
4 representatives of the German Federal Ministry of the Interior (Department M: Migration; Refugees; Return Policy & Department B: Federal Police Affairs) & 1 representative of the	German Federal Ministry of the Interior (BMI)	Alexandra Schmid	25.6.2021, 15:30

Name of the interviewee	Representing organisation	Interviewed by Ecorys staff member	Date and time of interview
Federal Office for Migration and Refugees (BAMF; International Affairs, Fundamental Migration Issues, EU Fund Management)			

## Stakeholder Interviewee overview Greece

Name of the interviewee	Representing organisation	Interviewed by Ecorys staff member	Date and time of interview
Gianluca Rocco, Simona Moscarelli	IOM Greece	Alexandra Schmid, Zinovia Panagiotidou	5/5/2021, 10:00
Anonymous	Ministry of Migration and Asylum	Zinovia Panagiotidou	19/5/2021, 11:00
Efcharis Mascha	Asylum Service (Ministry of Migration and Asylum)	Zinovia Panagiotidou	16/7/2021, 14:30

## Stakeholder Interviewee overview Poland

Name of the interviewee	Representing organisation	Interviewed by Ecorys staff member	Date and time of interview
Agnieszka Kosowicz, President of the Board	Polish Migration Forum	Katarzyna Lubianiec	11 <sup>th</sup> May 2021, 1 PM CET
Anonymous	Ministry of Interior, Department of International Affairs	Katarzyna Lubianiec	19 <sup>th</sup> May 2021, 12 PM CET
Katarzyna Przybysławska - President of the Board	Halina Niec Legal Aid Centre	Katarzyna Lubianiec	20 <sup>th</sup> May 2021, 3 PM CET
Anonymous	Polish Border Guard	Katarzyna Lubianiec	Written communication dated 2 <sup>nd</sup> June 2021
Anonymous	Office for Foreigners	Katarzyna Lubianiec	Written communication dated 1 <sup>st</sup> June 2021

## B.2 Summary of Stakeholder views

The governmental and non-governmental representatives in the case study countries provided insightful information on the CEAS and a first assessment of the new pact on Migration on the current asylum and border procedure on site. The perspectives on effectiveness, efficiency and the relevance of the new legislations on the national asylum and border procedures differ among stakeholders. However, a general trend can be observed in which many shortcomings of the CEAS, including the lack of solidarity and inefficiency of the Dublin III regulations, are pointed out. Furthermore, stakeholders share similar concerns on fundamental rights infringements as well as social impacts on asylum applicants and communities that would be facilitated by the introduction of the new pact on Migration. Due to lack of data, the economic dimension could not be as extensively assessed as the other dimensions.

## Sweden

Although all respondents raised a number of difficulties and concerns, the new pact, like CEAS, is widely supported in Sweden, notably in its normative attempts to promote solidarity, responsibility-sharing, and a more horizontal approach to migration across EU Member States. Stakeholders' main concerns included (I) potential increases in detentions and the resulting fundamental rights, social, and economic consequences; (II) lowered age-limits (for example, screening); and (III) Member States' ability to 'opt-out' of burden-sharing and the Commission's lack of focus on addressing the underlying factors that drive some Member States do not comply with current CEAS measures; (IV) increased costs for Sweden in the eventuality of having to set up external border procedures. Since Sweden already provides a high level and comprehensive set of rights and safeguards for migrants, particularly disadvantaged groups, none of the stakeholders surveyed anticipate the new pact to extend the present level of social protection and basic rights. When considering the new pact's possible negative consequences, it was observed that extending the initial screening time during the asylum procedure might harm applicants' ability to integrate into Sweden's labour market and society. Various Swedish stakeholders applauded the Pact's broadening of the concept of 'family,' noting that it may have a good influence on integration in Sweden since people seeking asylum will be more motivated to stay in the same Member State as their relatives. As a result, there may be fewer Secondary Movements inside the EU. However, from a fundamental rights perspective, the expanded use of detention under the proposed Reception Directive was highlighted by numerous stakeholders as being worrisome. In addition to noting that the inclusion of Secondary Movements as being acceptable grounds for de-facto detention under the new pact is highly unfortunate, stakeholders were critical of the manner in which the new pact allows for the screening of children from the age of 12, instead of 18.

## Spain

According to the findings of the desk study and interviews, the EU now delegated responsibility for the reception of asylum seekers to countries on its perimeter, such as Spain, allowing certain member states to decline to do so. Return and admittance are the main priorities right now, although relocation isn't on the list. The CEAS overlooks mandatory relocation as a way to more evenly distribute the burden among EU countries. This has lately been obvious in the Canary Islands, where arriving migrants are being kept in overcrowded receiving centres, and fundamental human rights are being violated. Another issue in Spain is the enormous backlog in asylum application processing and the rising backlog managed by the Asylum and Refugee Office. The new pact has been criticized by Spanish NGOs in general, both in interviews and in literature. At the southern border, they do not see a major improvement for Member States. The possibility of overcrowding in receiving centres has not been adequately addressed. Furthermore, NGOs criticize the Pact's concentration on migration restriction, despite the fact that it does not offer a new legal pathway to access asylum in Europe.

## Italy

Overall, NGOs agree that the Pact and its proposals normalise and attempt to legislate current practices that should be exceptional, such as accelerated border procedures and detention, de facto providing a legal framework for illegal practices already in place in some Member States. Additionally, all interviewees, including governmental representatives, have stressed that the proposed new measures again do not place the individual, and its rights, at the centre but rather continue to perceive migration under a securitised lens. According to both interviews and desk research, the proposals could affect the right to liberty; the right to access asylum procedures; the right of access to justice (right to legal aid, right to a fair trial, and right to an effective remedy); the right of individual assessment of asylum applications; and the violation of children's rights (as a result of detention). From a territorial perspective, the Pact makes no substantial changes to the –

presently inefficient – Dublin regulation's operating procedures, stating that the so-called solidarity mechanism is still insufficient, particularly for first-entry countries like Italy. The current Member State imbalances are anticipated to persist. The planned family reunion procedures are regarded as beneficial. However, there has been criticism of discriminating against underage minors between the ages of 12 and 18. Some non-governmental organisations have also stated that a stressful screening procedure may have an influence on asylum seekers' subsequent assimilation into society. Although concrete economic estimations were not made, the 12-week deadline has been assessed as very unlikely to meet and possibly place additional economic/capacity strain on the authorities and limit the fundamental rights of the asylum seekers. The requirements for the border crossing points closely resemble the characteristics of the current hotspots, whose poor conditions have been repeatedly stressed.

### **Germany**

Many critics foresee a weakening of procedural protections and an increase in detentions within the EU, which is reflected in German NGOs' evaluation of the new pact. The NGOs are particularly concerned about the formalization of the 'myth of no admission' and the absence of accountability for the split of incoming migrants into separate asylum procedures. The barriers to entry into the European System are becoming increasingly high, necessitating greater amounts of energy and commitment on the part of those seeking protection. The humaneness of the asylum procedure is being questioned, especially in light of the potential of detention for children and the emphasis on deterrent rather than real sympathy. However, all sources agree that the Act largely affects the degree of accessibility to the German asylum system as a whole and that there are few particular deep-cutting changes for the German situation.

The new Migration Pact plan wants to maintain the present scenario of duties being distributed from Dublin III. From the perspective of the German government, a completely different plan that really advocates for equitable distribution should be pursued. The BMI applauds the implementation of non-bureaucratic multiplication methods. This might lead to more efficient transfer completion more efficiently in practice and recourse to an improved Eurodac database. Furthermore, the German government does not expect any violations of basic rights as a result of the Pact's implementation in Germany. NGOs have noted that it is presently impossible to estimate how the Pact would affect basic rights in Germany, but they are particularly concerned about an increase in detentions, particularly of children.

### **Greece**

Three significant concerns mainly emerge from the findings of the desk research and interviews in Greece: the extensive focus of the pact on the acceleration of procedures, the lack of balance in the allocation of asylum seekers between Member States, and the absence of an automatic solidarity mechanism. Greece is faced with large influxes of immigrants, putting immense pressure on its borders without having the capacity and resources to encounter these levels. Local stakeholders argue that the solidarity mechanism as it is currently presented is still insufficient to relieve this pressure. Current imbalances are expected to remain which is largely to the detriment of countries of first entry and receiving countries of secondary movement.

Moreover, one of the main challenges of Greece are its responsibilities as the first point of entry. Stakeholders seem to share the opinion that there are no substantial differences in the Dublin regulation, which has proven to be problematic in Greece, especially after the signing of the EU-Turkey agreement in 2016. It is a common belief that there should be a fairer allocation of asylum seekers between Member States but also that this is not foreseen in the new pact. In particular, governmental interviewees stressed the importance of this matter. They both argued that both

social and economic impacts highly depend on allocation as refugees and immigrants' social and economic integration depend on the receiving country's capacity and not on the pact.

Finally, the addition of extra layers of procedures and their acceleration are perceived as unnecessary while they do not tackle the roots of Greece's problems.

## **Poland**

There are many concerns on the Polish side concerning the implementation and effectiveness of the new pact and its implications for the asylum border and application procedures. On the one hand, Poland expresses strong opposition to the new plan for an asylum-seeker distribution scheme. According to Ministry representatives, the new distribution method would simply encourage more migrants to arrive since the European Union will aggressively demonstrate its expanding housing capacity for asylum seekers. Instead of dispersing asylum seekers within Europe, Poland would prefer to focus on adequately closing the borders and reinforcing the returning system. On the other side, many non-governmental stakeholders fear the infringements of fundamental rights of the asylum seekers. It's unclear if the Pact will have a beneficial influence on asylum seekers' and migrants' fundamental rights. Additional human resources and processes, as well as a control system, would be required to ensure conformity with the EU's Fundamental Rights Charter. It is unlikely that the real implementation will take place due to a lack of political will.

## **B.3 Main findings**

The following section presents the main findings of the country research sectioned by country and their assessment of the Baseline Scenario and the impact of the new pact on Migration on the economic, social, territorial and fundamental right dimensions.

## **Sweden**

### ***Baseline situation***

Over the past decade, Sweden has been a major destination country for immigration by third-country nationals. The country admits more asylum seekers than any other EU state in 2015 when measured on a per capita basis. The large immigration influx can in part be attributed to the country's long track-record of openness towards refugees and a proactive resettlement policy, including a strong adherence to and promotion of the Common European Asylum System (CEAS). As such, desk research indicates that Sweden has had no major implementation or operational issues with CEAS. In fact, expert interviews indicate that the Swedish government and civil society actors have provided asylum seekers and migrants with a level of social, economic, territorial and fundamental rights protection that goes beyond what CEAS' envisions. This includes a monthly allowance, full access to the Swedish Welfare system, including healthcare, as well as a high-level of protection and promotion of the rights and needs of vulnerable groups, including children, women and members of the LGBTQ+ community. However, although expert interviews to a far extent corroborate this notion, it has also been noted that on a national and EU-level, numerous contextual gaps and issues with CEAS have been problematic from a Swedish perspective, namely:

- **National anti-immigration discourse and policies.** For example, in late 2015, the Swedish government announced plans to roll back national provisions ensuring humanitarian protection for refugees or people feeling armed conflict under 'particularly distressing circumstances', leading to asylum only being granted where applicable according to international or EU law. Desk research and expert interviews indicate that such policy changes have occurred in parallel to the development of a national socio-political discourse, which increasingly promotes the idea that immigrants challenge or even threaten the Swedish welfare state, societal values and national security;

- **Lack of solidarity and harmonization at an EU-level.** The Swedish government has campaigned for a stronger solidarity and adherence to the Common European Asylum System (CEAS) across the EU, including the harmonization of national systems and a fairer allocation of asylum seekers. When interviewed, Swedish government representatives agreed with the five issues identified by the European Commission as applying to the current situation, highlighting that (I) a lack of solidarity among Member States in absorbing refugees within their designated quotas and (II) inefficiencies with the Dublin III system are particularly problematic;
- **Differences in asylum conditions and outcomes between Member States.** When looking at the implementation of CEAS across the EU, numerous experts noted that Member States differ greatly in asylum outcomes and conditions, resulting in significant differences between the protection and recognition rates of Member States. One interviewee noted that, as such, there is a lack of harmonization when it comes to making fair asylum decisions, further causing secondary movement issues for countries like Sweden, which are generally known for offering good reception conditions and outcomes for asylum seekers.

### ***Potential Impact new pact On Migration***

Although numerous issues and concerns were flagged by all interviewees (see sections above), the new pact, much like CEAS, is generally welcomed in Sweden, particularly in its normative efforts to further solidarity, responsibility sharing and push for a more horizontal approach to migration across the EU's Member States. The main issues highlighted by stakeholders were (I) potential increases in detentions and the fundamental rights, social and economic impacts it stands to have; (II) lowered age-limits (for e.g. screening); (III) the ability for Member States to 'opt out' from burden sharing and a lack of focus by the Commission on tackling the underlying factors that drive some Member States to not comply with current CEAS measures; (IV) increased costs for Sweden in the eventuality of having to set up external border procedures.

- **Economic Dimension:** Concrete economic estimates were not provided by desk research or stakeholder consultations. However, it was noted that the realization of procedures related to the solidarity mechanism envisioned under RAMM stands to impose a significant economic impact on Member States, including Sweden. Specifically, high administrative costs are predicted for the following tasks: keeping track of incoming asylum seekers, their distribution across the EU, reporting duties and the calculation of 'fair shares' between Member States. Additionally, in accordance with the new pact's proposed asylum criteria, another administrative burden and cost for Sweden stand to be that of setting up the infrastructure and training required for a formal border and screening procedure at the country's external borders;
- **Social dimension:** As Sweden already ensures a high level and extensive set of rights and protections for migrants, including vulnerable groups, none of the consulted stakeholders expect the new pact to expand the social protection and fundamental rights currently offered in Sweden. When looking at potential detrimental effects of the new pact, it was noted that if the initial screening period during the asylum procedure is extended, applicants' abilities to integrate into Sweden's labour market and society may be negatively affected;
- **Fundamental rights dimension:** From a fundamental rights perspective, the expanded use of detention under the proposed Reception Directive was highlighted by numerous stakeholders as being worrisome. In addition to noting that the inclusion of Secondary Movements as being acceptable grounds for de-

facto detention under the new pact is highly unfortunate, stakeholders were critical of the manner in which the new pact allows for the screening of children from the age of 12, instead of 18. The Pact's expansion of the definition for 'family' was welcomed by various Swedish stakeholders, who noted that it may have a positive impact on integration in Sweden as those receiving asylum will be more incentivised to stay in the same Member State as their relatives. As a result, the number of Secondary Movements within the EU may decrease;

- **Territorial dimension:** None of the consulted experts indicated that they expected the new pact to have a positive effect on the current territorial measures in Sweden. If anything, it was noted that the problem of segregation and public opinion against immigrants could worsen if the new pact leads to an increase in the number of asylum seekers coming into the country.

## Spain

### *Baseline situation*

The desk research and the interviews have shown that, at present, the EU delegates the responsibility of the reception of asylum seekers to countries on its periphery, such as Spain, allowing some member states to refuse to assume it. The focus currently is on return and admission, but not on relocation. The CEAS misses compulsory relocation to share the burden between EU countries more equally. This has become apparent recently in the Canary Islands, where the incoming migrants are held in overcrowded reception centres in which basic human rights cannot be fulfilled. Another challenge in Spain is the significant backlog in the processing of asylum applications and the growing backlog handled by the Asylum and Refugee Office. Because immigrants are more likely to work in the deregulated sector and their eligibility for social benefits is largely dependent on their participation in the regular labour market, welfare states like Spain, which rely heavily on contributory schemes and have large informal economies, offer relatively weak protection to immigrants. The 2008 financial crisis emphasised the importance of the informal sector, resulting in institutional inertia that made it difficult for immigrants to enrol in insurance schemes. Despite the fact that immigrants' need for social protection rose as a result of the crisis, their actual use of social benefits decreased as a result of their limited access to the formal labour market and more restrictive conditions. The National Ombudsman raised concerns regarding the rights of migrant agricultural labourers, according to the Fundamental Rights Agency. The Ombudsperson urged government agencies, employers, and agricultural groups to come up with coordinated and immediate remedies to encounter these conditions.

### *Potential Impact new pact On Migration*

The overall assessment of Spanish NGOs, both in interviews and in literature, is critical of the new pact. They do not see a significant improvement for Member States at the southern border. The risk of overcrowded reception centres has not been mitigated to a satisfactory extent. Moreover, NGOs are critical of the focus on migration control of the Pact, while it does not propose new legal pathways to access asylum in the EU. Furthermore, NGOs added that the European environment with an anti-migration narrative has a negative impact on the Pact.

- **Economic Dimension:** The formula proposed by the European Commission for the reception at the border, which envisages detention for longer periods than those established in Spanish legislation, is expected to change the Spanish model of migrant detention. The Spanish authorities, although they differ, see this proposal as a costly and inefficient way to carry out expulsions, which do not depend so much on time and confinement as on a strong policy of cooperation. In this sense,

- ties with countries of origin and transit and the improvement of return policy are key elements;
- **Social Dimension:** The reception conditions for asylum seekers in Spain include coverage of personal expenses for basic needs and items for personal use, transport, clothing, educational activities, training in social and cultural skills, learning the language of the host country, vocational training and training for long life, leisure and free time, childcare and other complementary educational type. This would not change with the pact. The best interest of the child would be affected in case there would not be an appropriate capacity to host children at borders during the pre-entry screening procedure;
  - **Fundamental Rights Dimension:** All of the fundamental rights are ensured in Spain. The problem is possible overcrowded facilities in which fundamental rights cannot be guaranteed. Moreover, the pre-entry control may entail a risk of reducing procedural safeguards possible breaches of the principle of non-refoulement and imply an excessive use of detention or situation of legal limbo;
  - **Territorial Dimension:** Both desk research and the interviews state that unless a compulsory relocation mechanism, the current imbalances will continue putting more pressure on countries with external borders in Southern Europe. The solidarity mechanisms of the Dublin regulation and the new solidarity mechanism introduced remain insufficient to relieve first entry countries such as Spain. In addition, there remains the risk of overload of the system, in particular in the Canary Islands, Ceuta and Melilla.

## Italy

### *Baseline situation*

The lack of a standardised system for reception and relocation among EU Member States, which places a disproportionate burden on first-entry countries like Italy, is apparent in the analysis of data obtained through desk research and interviews; a high number of arrivals, despite a consistent downward trend, which frequently surpasses the capacity of local receiving centres, resulting in congestion and bad living conditions; and inadequate Dublin regulation and a lack of a cohesive strategy. The problems outlined by the European Commission in the new pact are valid in this regard. Nonetheless, according to both governmental and non-governmental actors examined, the most important deficit is a migration and asylum policy that is excessively securitized and fails to prioritize the rights of asylum seekers. The problems outlined by the European Commission in the new pact are valid in this regard. Nonetheless, according to both governmental and non-governmental actors examined, the most important deficit is a migration and asylum policy that is excessively securitized and fails to prioritize the rights of asylum seekers.

From a policy perspective, recent developments in the Italian legal framework have redressed the particularly controversial situation, in particular with regard to the protection of the fundamental rights of asylum seekers and migrants, that had come to be with the 'Security Decrees' of 2018-2019. Nevertheless, a securitarian approach to migration remains mostly in place. National and international NGOs have stressed as key critical elements, with regard to the **protection of fundamental rights**, the lack of procedural and legal safeguards for asylum seekers in hotspots; poor living conditions and situations of arbitrary detention which affect the right to personal liberty; lack of qualified personnel to perform vulnerability screenings and therefore help non-visible vulnerabilities emerge; limited access to information and insufficient access to hotspots and reception centres by external independent monitoring parties. With regard to **social protection**, asylum seekers and holders of international protection permits are able to access the welfare system, including health, social security services and education. Their insertion in the 'Reception and

Integration System' (SAI) also aims to facilitate their integration and insertion into society by providing, in addition to material support, a series of functional activities for regaining individual autonomy, such as the teaching of the Italian language, training and professional qualification, legal orientation, access to services in the area, orientation and job placement, housing and social integration, as well as psycho-socio-health protection. Upon reception of the receipt showing the application for asylum, these individuals can also enter the labour market. Both desk research and interviews have evidenced that asylum seekers tend to enter the labour market in sectors that are most subject to organised crime infiltration and exploitation. This is particularly the case with the agriculture field, and the form of exploitation is defined as *caporalato*. Finally, from a **territorial perspective**, significant shortcomings and lack of effectiveness of the Dublin regulation have been highlighted, stressing a lack of balance across EU Member States.

### **Potential Impact new pact On Migration**

Overall, it is worth noting that NGOs, both in interviews and in literature, converge on the assessment that the Pact and its proposals normalise and attempt to legislate current practices that should be exceptional, such as accelerated border procedures and detention, '*de facto providing a legal framework for illegal practices already in place in some member states (such as push-backs, arbitrary detention and shrinking of asylum space.*<sup>891</sup>' Additionally, all interviewees, including governmental representatives, have stressed that the proposed new measures again do not place the individual, and its rights, at the centre, but rather continue to perceive migration under a securitised lens:

- **Economic Dimension:** Although concrete economic estimations were not made, the 12-week deadline has been assessed as very unlikely to meet and possibly placing additional economic/capacity strain on the authorities, as well as limit fundamental rights of the asylum seekers. The requirements for the border crossing points closely resemble the characteristics of the current hotspots, whose poor condition have been repeatedly stressed;
- **Social Dimension:** Access to health services and information rights can be affected negatively in the context where the screening procedures would take place in hotspots, in light of challenges such as the ones highlighted above. NGOs have also stressed that the accelerated border procedures can have a particular impact on the identification and reception of vulnerable groups, with doubts arising regarding access to information, access to a lawyer, real capacity of conducting vulnerability assessment and accessing remedies. The proposed measures touching on family reunification are deemed as positive, although criticism has arisen with regard to the discrimination amongst underage children between 12-18 years of age. Some NGOs have also highlighted that as a result a traumatic screening procedure might impact later on integration of asylum seekers into society;
- **Fundamental Rights Dimension:** this is the area that is deemed to be most significantly affected by the pact, with both interviews and desk research indicating that the proposal can have an impact on the right to liberty; the right to access asylum procedures; right of access to justice (right to legal aid, right to a fair trial right to an effective remedy); right of individual assessment of asylum application; violation of children' rights (as a result of detention of minors between 12-18 years);
- **Territorial Dimension:** from a territorial standpoint, desk research and interviews show that the Pact does not significantly change the working mechanisms of the – currently

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<sup>891</sup> EuroMed Rights, [A 'fresh start' for human rights violations](#). Analysis of the New EU Pact on Migration and Asylum, 2020.

ineffective – Dublin regulation, reporting that the so-called solidarity mechanism remains inadequate, in particular for first entry countries such as Italy. Current imbalances across Member States are expected to remain. Additionally, current reception systems in Italy would remain insufficiently equipped for the proposed revised border procedures.

Name of the interviewee Representing organisation Interviewed by Ecorys staff member Date and time of interview Giovanni di Dio Ministry of Labour and Social Affairs, Immigration Directorate Federica Genna, Consultant Security & Justice, Ecorys 11 May 2021, 11:00 CET Giada Geraci Anonymous Borderline Sicilia 12 May 2021, 11:00 Anonymous Italian Refugee Council (CIR) 13 May 2021, 15:00 Anonymous.

## **Germany**

### ***Baseline situation***

The current situation in Germany can be described as relatively stable when compared to the situation that had ensued during the 'refugee crisis'. Procedural and humanitarian guarantees have been put in place and seem to be generally applied across the board, with very few exceptions.

During the asylum process, the applications are provided legal assistance and advice, and the made decision can be challenged in court. Traumatized individuals and other people with particular vulnerabilities, if identified, are interviewed by trained professionals. However, the identification process of special needs is not systematic and NGOs point out that even if identified, many do not receive the support needed during and after the asylum process. The protection of minors is especially high in Germany: there is an existent systematic evaluation of vulnerabilities for minors, and all children are granted the same rights as German children. Furthermore, unaccompanied minors are adequately protected and cared for.

The economic situation for asylum seekers is relatively stable, and no indication for large scale exploitation is visible. Access to the job market is generally possible, pending certain conditions. Under the asylum seekers benefit act, a minimum of monetary, social and medical entitlements are granted to asylum seekers. However, NGOs point out that while it is admirable that this provision exists in the first place, the provisions are still very limited and might lead to individuals falling under the poverty line, which is illegal under the German law. There is an ongoing court process trying to determine the legality of the limited resources provided.

Especially the lack of medical entitlements, particularly in the field of psychological support has moved back into the focus of political debate recently, after a 24 year old man from Somalia with a residence permit killed three women in Würzburg in July 2021. The lack of psychological help offered to him and the lack of integration he had experienced, mirror the experiences of many others and need to be addressed by politics.

As the Bundesländer, the individual states are responsible for a defined percentage of asylum seekers under a distribution key, there is a large variation between different accommodations from state to state. The safety, cleanliness and proximity to cities depends highly on the individual state. As asylum seeking individuals are required to stay within the Bundesland they were assigned to for a certain period of time, this is often stated to have a limiting effect on the chances of employment and integration. It furthermore constitutes a differentiation between Germans and Asylum Seekers in the level of freedom of movement granted.

### ***Potential Impact new pact On Migration***

The assessment of the new pact by German NGOs coincides with many of the critical voices fearing a lowering of procedural safeguards and a rise in detentions within the EU. Especially the formalization of the 'myth of no entrance' and the lack of accountability for the division of arriving migrants into different asylum procedures is worrying to the NGOs. The hurdles in accessing the

European System are being set increasingly higher, requiring increasing amounts of energy and determination by people seeking protection. The humanity of the Asylum process is seen to be diminishing, especially considering the possibility of detention for minors and the particular focus on deterrence of arriving people rather than true solidarity.

However, all sources point to the Act primarily changing the level of accessibility to the German asylum system overall and do not see many concrete deep-cutting changes for the situation in Germany.

- **Economic Dimension:** Estimates of the economic situation have not been shared by the contact persons in the BAMF thus far. The extension of the term 'family' is expected to further blur the lines of responsibility between Member States and contribute to a higher administrative load;
- **Social Dimension:** The Pact seeks to undermine all secondary movements, particularly through the exclusion from all social benefits and provisions of people who travel from the difficult hotspot situations on to other regions. Even though the current situation in border countries is dire and the wish for people to continue their journey into places such as Germany is more than understandable, civil society organisations in Germany might be forced to turn people seeking help away and force them to return to situations at the external borders which can be classified as inhumane, if the Pact is accepted in its current state. All asylum seekers legally received in Germany are not expected to experience any changes to the Status Quo of social protection in Germany stemming from the new pact. However, people arriving through secondary movements are feared to be treated inhumanely;
- **Fundamental Rights Dimension:** The German administration does not foresee any breaches in fundamental rights through the introduction of the Pact in Germany. NGOs have pointed out that it is currently difficult to assess what the fundamental rights would change due to the Pact in Germany but are highly concerned about an increase in detentions, especially of minors. As well as the shortening of procedural time spans, which will make it less likely for family reunifications to succeed. This process already barely fits into the current time frame, and the shortening of time frames will make it almost impossible for all necessary steps to be taken with only limited knowledge of the language;
- **Territorial Dimension:** The proposal of the new migration pact seeks to continue the current situation of distributing responsibilities from Dublin III. From the point of the Germany administration, an entirely different proposal which actually advocated fair distribution should be aspired. The BMI welcomes the introduction of unbureaucratic multiplication procedures. This could lead to transfers being completed more efficiently in practice, also with recourse to an improved Eurodac database.

Name of the interviewee Representing organisation Interviewed by Ecorys staff member Date and time of interview Anonymous Deutsches Rotes Kreuz Paula Heckenberger 2.6.2021, 12:00-13:00 Anonymous Jesuiten Flüchtlingsdienst Deutschland Paula Heckenberger 4.6.2021, 9:30-10:00 4 representatives of the German Federal Ministry of the Interior (Department M: Migration; Refugees; Return Policy & Department B: Federal Police Affairs) & 1 representative of the Federal Office for Migration and Refugees (BAMF; International Affairs, Fundamental Migration Issues, EU Fund Management) German Federal Ministry of the Interior (BMI) Alexandra Schmid 25.6.2021, 15:30.

## Greece

### *Baseline situation*

The interview and desk research data analysis expose the CEAS' flaws, notably in terms of territorial concerns regarding unfair asylum seeker allocation between Member States and certain Member

States' unwillingness to accept immigrants. Greece is facing an influx of immigrants that is out of proportion to the country's population. Furthermore, the unique nature of the EU-Turkey agreement, which Greece is bound by, results in substantially higher influxes of AS, mainly from Turkey, into the country's islands. Greece lacks the ability and resources to deal with such a high level of demand, resulting in congestion and terrible living conditions at receiving centres. Simultaneously, flaws in the Dublin rule concerning the criteria of accountability of the Member States of first entrance result in long proceedings and large levels of secondary migration.

This has far-reaching implications for social and fundamental rights. The question of ensuring that all AS are granted refuge is a concern. Meanwhile, long processes, a lack of cultural mediators and interpreters, as well as human resources, make it difficult to prevent smuggling and human trafficking, particularly at land borders. Immigrants are seldom given social rights because they confront barriers to effective information, healthcare, education, and social benefits.

In terms of economics, given Greece's financial situation, immigrants have difficulty finding work outside of the informal sector, leaving them with poor salaries and little job security. Greece also lacks adequate receiving facilities and refugee camps. The majority of refugee camps are now located outside of metropolitan areas with access to healthcare and other public services. Interviewed stakeholders recognised the lack of an automated pressure-relieving mechanism as the most important deficiency in both the current and new pacts, based on the foregoing inputs. The governmental respondent, in particular, emphasised the necessity of having an automatic solidarity mechanism in place in the event of overwhelming strain.

### ***Potential Impact new pact On Migration***

Overall, the research team observed deep concerns regarding the logic behind some of the new pact's elements. More specifically, concerns are expressed about the extensive focus on the acceleration and increased number of procedures rather than on a fairer and more efficient allocation of asylum seekers between Member States.

- **Economic Dimension:** No solid economic estimations could be made but our governmental interviewee stressed that the shortening of procedures is not the solution to all problems, including financial concerns. The new pact does not seem to reflect this by highly focusing on the reduction of timing;
- **Social Dimension:** Refugees and immigrants' integration depends on the receiving country's capacity and not on the pact. Greek citizens and recognised refugees receive the same social allowances but that amount is four times lower than what a refugee can receive in other countries. The issue lies in how much the country has to offer and due to austerity measures, Greece's resources are limited. Pre-integration conditions also depend on reception location. Healthcare, education, and access to the labour market capacity is different in bigger cities such as Athens or Thessaloniki compared to Leros or Kastanies (a small town) in Evros. According to both our interviewees, reception and reception conditions, economic and social integration and social cohesion all depend on the allocation;
- **Fundamental Rights Dimension:** Desk research has revealed that this dimension has been an issue for Greece for a long time as accusations of human rights breaches from pushbacks have been prominent during the last years. NGO interviewees stated that internal national monitoring mechanisms for upholding human/fundamental rights are highly needed but do not exist in Greece. However, no input on the impact of the new pact has been obtained from interviews;
- **Territorial Dimension:** The solidarity mechanism of the new pact seems to remain inadequate according to stakeholders, in particular for first entry countries such as Greece. Current imbalances across Member States are expected to remain in place.

However, if that will be the case, governmental stakeholders suggest that the countries of first entry and of secondary movement reception will be the 'losers' while the Member States not accepting any immigrants will be the 'winners' of the situation.

Name of the interviewee Representing organisation Interviewed by Ecorys staff member Date and time of interview Gianlucca Rocco, Simona Moscarelli OM Greece Alexandra Schmid, Zinovia Panagiotidou 5/5/2021, 10:00 Anonymous Ministry of Migration and Asylum Zinovia Panagiotidou 19/5/2021, 11:00 Efcharis Mascha Asylum Service (Ministry of Migration and Asylum) Zinovia Panagiotidou 16/7/2021, 14:30.

## Poland

### *Baseline situation*

The primary concern, according to the desk study and interviews, is the attitude toward immigration. Asylum-seekers and migrants are not seen as a vital, useful, or desired component of the Polish social environment — on both a social and political level. There is little social will, and much less political will, to create a hospitable environment. If migrants opt to live on their own, they will have difficulty integrating and earning a livelihood. The conditions at the detention institutions are harsh, but not to the point of being human rights abuses. This, along with migrants' 'image of the wealthy West,' causes many asylum seekers to abandon the process and flee to other countries after entering Poland, and therefore the EU. Migrants' fundamental rights are not adequately safeguarded, both throughout the admission process and once they have arrived in the nation. The subject of admission to the asylum system, which has already reached the European Court of Human Rights in Strasbourg, is one of the most concerning issues. Both of these reasons – the unwillingness to accept asylum-seekers to the process, as well as the migrants' unwillingness to participate – exacerbates the social integration of asylum-seekers into the Polish society.

### *Potential Impact new pact On Migration*

- **Economic Dimension:** Most of the proposed changes are welcomed by the representatives of all sectors, both official stakeholders and NGOs. As Poland does not have a border procedure defined, introduction of such would be beneficial both from the organisational point of view (to eliminate potential chaos), as well as in terms of migrants situation and adding transparency to the process of border crossing. According to the interviews, as well as the desk research, monitoring of fundamental rights is very much welcomed and needed, as they are currently absent. There are some doubts regarding the details of the medical screening – both in terms of its purpose, as well as difficulties in assessing health, including psychological health, during the quick check-up. None of the interviewees, however, raised doubts regarding the costs of the changes to be introduced. Although the Ministry of the Interior expressed its hopes to receive support in funding, the stakeholders do not perceive the economic aspects to pose an obstacle for the implementation of envisaged changes;
- **Social Dimension:** The Pact focuses on the migrants' access to social rights only to a limited extend. More importantly, social cohesion and social capital are both not considered to ensure a smooth integration into the host society. Furthermore, the Pact does not address community-building in the sense of establishing a new Europe with joint efforts in which the mindset of the host community should be steered through public consultation and awareness-raising campaigns. Consequently, when it comes to basic social rights of the migrants, there is not much changed envisaged compared to the current situation;
- **Fundamental Rights Dimension:** It is doubtful whether the Pact will positively impact fundamental rights of asylum seekers and migrants. Ensuring compliance

with the Fundamental Rights Charter of the EU would require additional human resources and introduction of procedures, as well as its control system. With the lack of political will, it is doubtful whether the actual implementation will take place. At the same time, screenings conducted by exhausted and unprepared staff members could harm the chances of asylum. Closing the reception centres (which currently operate as open in Poland) could also lead to fundamental rights violations and abuses. Lastly, the 'defensive' character of the Pact, aimed at securing EU borders rather than securing migrants rights, raises concerns whether it will be able to serve as a tool for fundamental rights protection;

- **Territorial Dimension:** Poland raises strong objection when it comes to the new proposal on the distribution system of asylum-seekers. According to representative of the Ministry, the new way of distribution would only cause more migrants to come since the European Union would actively exhibit its growing accommodation capabilities for asylum seekers. Poland would rather focus on properly sealing the boundaries and reinforcing the returning system than allocating asylum-seekers within Europe.

Name of the interviewee Representing organisation Interviewed by Ecorys staff member Date and time of interview Agnieszka Kosowicz, President of the Board Polish Migration Forum Katarzyna Lubianiec 11<sup>th</sup> May 2021, 1 PM CET Anonymous Ministry of Interior, Department of International Affairs Katarzyna Lubianiec 19<sup>th</sup> May 2021, 12 PM CET Halina Niec Legal Aid Centre Katarzyna Lubianiec 20<sup>th</sup> May 2021, 3 PM CET Anonymous Polish Border Guard Katarzyna Lubianiec Written communication dated 2<sup>nd</sup> June 2021 Anonymous Office for Foreigners Katarzyna Lubianiec Written communication dated 1<sup>st</sup> June 2021.

## B.4 Summary of current situation in selected EU Member States

### ***B.4.1. Main challenges with the current CEAS***

Overview of main challenges as highlighted by national Stakeholders during interviews: Imbalances between north and south in terms of number of applicants. Specifically, countries with an external border are more impacted than other Member States;

- An ineffective Dublin system;
- Lack of a system that places the rights of the individuals at its centre;
- Lack of legal pathways for migrants;
- Lack of access to proper reception procedures;
- Ineffective cooperation with third countries, particularly with a view to improving integration;
- Lack of solidarity and harmonisation at an EU-level, namely in the form of an unequal implementation of CEAS among Member States;
- Differences in asylum conditions and outcomes between Member States, which leads to 'asylum lottery'. As such, there exists no uniform EU-approach to handling asylum seekers and their cases.

### ***B.4.2 National border procedures in selected Member States***

The selected case study countries, namely, Sweden, Germany, Greece, Italy, Spain and Poland, reveal that current national border procedures do not follow a common approach in which the same principles or operational measures are implemented. A common understanding of what a border procedure is does not exist among the Member States. Some Member States refuse legal entry to applicants at the border and process their asylum applications while restricting or denying their freedom of travel but do not classify this as a border practice under their respective national laws. In this way, they effectively use a border procedure while avoiding the use of the applicable EU provisions governing them.

Table D.1 gives an overview of the different approaches of the Member States: merely a few Member States have made the border practice of the CEAS a legal requirement. At the same time, national practices regarding the duration, time limits, use of custody, and procedural assurances accorded to applicants vary widely among those who apply the border procedure. The consistency and adherence to fundamental rights in decisions inherent to the border and/or asylum application procedures in some Member States, namely Italy, Spain, Poland, Greece, have been questioned by numerous civil society organisations interviewed so far.

It should also be noted that there are large differences between the use of border procedures in Member States who only have external borders at ports or airports and land borders, and those who have external maritime borders.

### **B.4.3 Application of the Return Directive**

With the adoption of Directive 2008/115/EC on common standards and procedures in Member States for returning irregular staying third-country nationals (the 'Return Directive'), the EP and the Council introduced a directive in which third-country nationals who do not have legal grounds to remain in the EU are returned successfully through fair and transparent procedures that fully respect people's fundamental rights and dignity. The Directive is structured into five chapters, including the principle of non-refoulement, return decisions, voluntary departure, return and removal of unaccompanied minors, as well as detention and entry bans.

During the interviews with the selected case study Member States, it became apparent that the Return Directive is not applied in 'border cases' by most Member States, who depend on Article 2(2)(a) of the Directive.<sup>892</sup> Since the Member States enjoy wide discretion concerning the form (decision or act, judicial or administrative) in which a return decision may be adopted, a trend appears in which several Member States have established maximum periods of detention substantially shorter than those permitted under the Directive.

Although Member States shall issue return decisions in writing and must give the reasons justifying the decision and information concerning possible remedies (Article 12(1)), compliance with these principles may not be observed due to various factors. The example of Poland and Italy indicates the different approaches taken by the Member State: In Italy, The National Commission for the Right to Asylum has recently compiled a practical guide for Asylum seekers, which describes the various steps. The guide is available in Italian, English, French, Spanish, Arabic and Farsi and also includes relevant contact details.

In Poland, the latest judgement of 23 July 2020 of the European Court of Human Rights in *M.K. and Others v Poland*<sup>893</sup> is an exemplary illustration of the problem. The case concerned the repeated refusal of Polish border authorities to examine applications for international protection. The Court held that Polish authorities had failed to review the applicants' requests for international protection and were responsible for collective expulsions, thereby exposing the applicants to a serious risk of chain-refoulement, in violation of the European Convention on Human Rights.

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<sup>892</sup> Scope of the Directive in border cases (Article 2(2)(a)): Member States may decide not to apply this Directive to third-country nationals who: (a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

<sup>893</sup> *M.K. and Others v Poland*: Repeated refusal to accept asylum applications amounted to collective expulsion, European Database of Asylum Law website, July 2020.

Table B.4: Overview of current Border Procedures (BP) in selected Member States

	<i>Definition of BP</i>
Italy	BPs as such were introduced for the first time with the 'Security Decrees' implemented by former Minister of Interior Matteo Salvini in 2018-2019. The decree had designated the transit and border areas where an accelerated procedure applies, <sup>894</sup> indicating the entire assessment of an asylum application can take place directly in these areas. In particular, the BP could be applied when applicants apply directly in these areas after being apprehended for evading/attempting to evade controls; or comes from a 'safe country of origin', also a novelty presented by these decrees.
Spain	BP applies to all asylum seekers requesting international protection at airports, seaports and land borders, as well as in foreigners' internment centres (CIE).
Greece	N/A
Sweden	No current use of BP. Asylum seekers that have arrived at Swedish borders or transit zones are considered to have entered Swedish territory. Fiction of 'non-entry' does not apply.
Poland	Poland does not have a BP defined. The only procedure in place is the asylum procedure. The Polish government is working on amendments to the asylum law in Poland. One of the most significant changes would be the introduction of BPs and a list of safe third countries and safe countries of origin. If Ukraine and Belarus are included on that list, which is the concern of HFHR, most of the asylum proceedings in Poland will fall under the category of BPs. <sup>895</sup>
Germany	N/A
	<i>Current asylum BP</i>
Italy	Upon receipt of the application, the local police (Questura) transmits the necessary documentation to the Territorial Commission, which must take steps for the personal interview within 7 days of the receipt of the documentation. The decision must be taken within the following 2 days – however, the duration of the entire procedure can last up to a maximum of 6 months <sup>896</sup> . A special form is used to register the asylum request <sup>897</sup> . The current system for reception <sup>898</sup> of asylum seekers is divided into different phases: I. rescue, first assistance and identification of migrants, especially in areas of disembarkation. First assistance is in principle ensured in governmental centres and temporary facilities, whereas procedures for rescue and identification are carried out in hotspots. This includes <u>health screening, identification and administration of information on how to apply for international protection/participation to the relocation programme</u> ; II. reception, which is in turn also divided in two phases. The first phase includes the identification of the individual (if it was not possible to carry out identification in hotspots), the formalisation and initiation of the procedure for the application for asylum, assessment of health conditions and <u>existence of vulnerabilities</u> . These steps can be carried out in governmental centres and existing reception centres such as CARAs

<sup>894</sup> Trieste and Gorizia; Crotona, Cosenza, Matera, Taranto, Lecce and Brindisi; Caltanissetta, Ragusa, Syracuse, Catania, Messina; Trapani, Agrigento; Metropolitan city of Cagliari and South Sardinia.

<sup>895</sup> Helsinki Foundation for Human Rights, Report dated April 2019, '[Access to asylum procedure at Poland's external borders](#)'.

<sup>896</sup> European Asylum Support Office, [Border Procedures for asylum applications in EU+ countries](#), Publications Office, 2020.

<sup>897</sup> Asylum in Europe, [Country report Italy: Border Procedure \(border and transit zones\)](#), 2021.

<sup>898</sup> Camera dei deputati Servizio Studi, [Diritto di asilo e accoglienza dei migrant sul territorio](#), 2021. This reference applies, unless otherwise indicated, to the entire description of the system.

	(Reception Centres for Asylum Seekers) and CDAs (Reception Centres). In case there are no places available, asylum seekers can be hosted in extraordinary reception centres – CAS. The Lamorgese Decree refined the material conditions of reception in government facilities of 'first stage', establishing the <u>need to ensure adequate hygienic, sanitary and housing standards – including social and psychological assistance, linguistic-cultural mediation, administration of Italian language courses and legal and territorial orientation services.</u>
Spain	The BP provided for in the Spanish Asylum Law is characterized by strict time limits, which may not exceed 4 days for the first instance decision and another 4 days for appeals. As with all asylum applications, the only authority in charge of the admissibility decision is the Ministry of the Interior.
Greece	<p>In the 'normal BP', where applications for international protection are submitted in transit zones of ports or airports, asylum seekers enjoy the same rights and guarantees with those whose applications are lodged in the mainland. However, deadlines are shorter: asylum seekers have no more than 3 days for interview preparation and consultation of a legal or other counsellor to assist them during the procedure and, when an appeal is lodged, its examination can be carried out at the earliest 5 days after its submission.<sup>899</sup></p> <p>For the fast-track procedure, 'the time that was given to applicants in order to exercise their right to 'sufficiently prepare and consult a legal or other counsellor who shall assist them during the procedure' was limited to one day. Decisions should be issued, at the latest, the day following the conduct of the interview and should be notified, at the latest, the day following its issuance. The deadline to submit an appeal against a negative decision was 5 days from the notification of this decision. When an appeal is lodged, its examination is carried out no earlier than 2 days and no later than 3 days after its submission, which means that in the first case appellants must submit any supplementary evidence or a written submission the day after the notification of a first instance negative decision; or within 2 days maximum if the appeal is examined within 3 days.<sup>900</sup></p>
Sweden	<p>No current BP. However, once an asylum applicant arrives at one of Sweden's external border crossings and declares his or her intent to seek asylum, they are referred by border personnel or Swedish police to the Swedish Migration Agency ('Migrationsverket') The general asylum application procedure can be condensed to the following four steps:</p> <ul style="list-style-type: none"> <li>• General application, where the applicant's photographs, fingerprints and identity documents are collected;</li> <li>• Assignment of General Counsel, if needed;</li> <li>• Investigative interview, during which applicants are offered numerous aids;</li> <li>• Decision, which, based on the interview and further investigation, either grants the asylum applicant a temporary or permanent residence permit, or refuses the application for asylum.</li> </ul>
Poland	Proceedings at the border are as follows: border guards verify whether a person has met the criteria for entry, as per the Schengen Borders Code. If they do not meet the criteria, he/she is denied entry. If they do, asylum procedures apply. No screening procedure happens at the border.
Germany	The admission procedure for asylum seekers is governed by the Asylum Procedure Act (AsylVfG). Asylum seekers whom border authorities permit to enter the Federal Republic of Germany or who are found in the country without a residence permit are transferred to the nearest reception centre of the relevant state. Using the nation-wide system for initial distribution, they are assigned to reception centres of the individual German states according to a formula defined in the Asylum Procedure Act. Next, their asylum

<sup>899</sup> Greek Council for Refugees, [Country report \(Greece\): BP \(AIRPORT AND PORT TRANSIT ZONES\)](#), 2020.

<sup>900</sup> Greek Council for Refugees, [Country report \(Greece\): FAST-TRACK BP \(EASTERN AEGEAN ISLANDS\)](#), 2020.

	<p>application is submitted to the responsible branch of the Federal Office for Migration and Refugees (BAMF) for examination and decision. Asylum seekers receive a certificate of permission to reside which grants a preliminary right to stay in the Federal Republic of Germany during the asylum procedure. BAMF case workers personally question asylum seekers (with the help of an interpreter) on their travel route and the reasons for persecution. The decision on the asylum application is based on the interview and any further investigations as needed. Asylum seekers are notified of the decision in writing and given information on legal remedy. If the asylum application is accepted, persons granted asylum status and those granted refugee status receive a temporary residence permit and are given the same status as Germans within the social insurance system. They are entitled to social welfare, child benefits, child-raising benefits, integration allowances and language courses as well as other forms of integration assistance. If neither asylum nor refugee protection can be granted, the BAMF examines in the course of the asylum procedure whether there are grounds for a deportation ban. This obligation to conduct an extensive review is intended to ensure that there is no delay in processing. Separate from the asylum procedure, the responsible foreigners authority requests an expert opinion from the BAMF and examines whether a deportation ban applies.</p>
	<i>Type of decisions made in BP</i>
Italy	N/A
Spain	The purpose of the BP is to assess whether an application for international protection is admissible or inadmissible and whether the applicant should be granted access to the territory for the purposes of the asylum procedure.
Greece	N/A
Sweden	Not applicable
Poland	Not applicable
Germany	N/A
	<i>Known cases in which access to the asylum procedure has been denied</i>
Italy	None
Spain	There are several reported cases of refusal of entry, refoulement, collective expulsions and push-backs, including incidents of up to a thousand people in 2018, and a hundred people in 2019 and 2020. <sup>901</sup>
Greece	Such cases exist. An application can be considered as inadmissible on the following grounds <sup>902</sup> : <ul style="list-style-type: none"> <li>• Another EU Member State has granted international protection status;</li> <li>• Another EU Member State has accepted responsibility under the Dublin Regulation;</li> <li>• The applicant comes from a First Country of Asylum;</li> <li>• The applicant comes from a Safe Third Country;</li> <li>• The application is a Subsequent Application and no 'new essential elements' have been presented;</li> <li>• A family member has submitted a separate application to the family application without justification for lodging a separate claim.</li> </ul>
Sweden	None
Poland	The latest judgement of 23 July 2020 of the European Court of Human Rights in <i>M.K. and Others v Poland</i> <sup>903</sup> is an exemplary illustration of the problem. The case concerned repeated refusal of Polish border authorities to examine applications for international

<sup>901</sup> Asylum in Europe, [Country report: Spain](#), 2020.

<sup>902</sup> Greek Council for Refugees, [Country report \(Greece\): ADMISSIBILITY PROCEDURE](#), 2020.

<sup>903</sup> ECtHR, [M.K. and Others v. Poland](#) (applications nos. 40503/17, 42902/17 and 43643/17), judgment of 23 July 2020.

	protection. <sup>904</sup> The Court held that Polish authorities had failed to review the applicants' requests for international protection and were responsible for collective expulsions, thereby exposing the applicants to a serious risk of chain-refoulement, in violation of the European Convention on Human Rights. <sup>905</sup>
Germany	N/A
	<i>Does the Member State fulfil its duty to inform persons of the possibility to apply for asylum?</i>
Italy	To some extent. The Mol and the National Commission for the Right to Asylum have recently compiled a practical guide for Asylum seekers in Italy, which describes the various steps <sup>906</sup> . The guide is available in Italian, English, French, Spanish, Arabic and Farsi and also includes relevant contact details.
Spain	N/A
Greece	To some extent. Competent authorities shall inform the applicant, within 15 days after the lodging of the application for international protection, of his or her rights and the obligations with which he or she must comply relating to reception conditions by providing an informative leaflet in a language that the applicant understands. This material must provide information on the existing reception conditions, including health care, as well as on the organisations that provide assistance to asylum seekers. If the applicant does not understand any of the languages in which the information material is published or if the applicant is illiterate, the information must be provided orally, with the assistance of an interpreter.
Sweden	Yes, fully
Poland	Access to the Polish territory and asylum procedures remains a matter of concern in practice. <sup>907</sup> Border monitoring activities confirm the existence of grave systemic irregularities and illegal practices at borders, hindering access to the asylum procedure. <sup>908</sup> Regarding the duty to inform persons of the possibility to apply for asylum, Ministry representatives refused to answer, stating they do not have such knowledge.
Germany	N/A
	<i>Remedies offered when entry is refused</i>
Italy	Asylum seekers can appeal a negative decision within 30 days before the competent Civil Court. Specialised court sections are tasked specifically with examining asylum appeals.
Spain	The BP provides for the possibility of requesting a re-examination of the application for international protection when the application has been declared inadmissible or rejected from examination. This type of administrative appeal is only provided for in the context of BPs. Access to free legal aid in border proceedings is mandatory and guaranteed by law. Therefore, unlike in the ordinary procedure, applicants for international protection are always assisted by a lawyer during their interviews with the border police and the OHR in the context of BPs, as well as during appeal procedures. <sup>909</sup>
Greece	N/A
Sweden	Not applicable for refusals of entry. However, when looking at refusals of asylum, appeals can be lodged, to which free legal aid and assistance (including translators) is always

<sup>904</sup> ECtHR, [M.K. and Others v. Poland](#) (applications nos. 40503/17, 42902/17 and 43643/17), judgment of 23 July 2020.

<sup>905</sup> ECtHR, [M.K. and Others v. Poland](#) (applications nos. 40503/17, 42902/17 and 43643/17), judgment of 23 July 2020.

<sup>906</sup> Ministero Dell Interio. '[Practical Guide for Asylum Seekers in Italy](#)'.

<sup>907</sup> [AIDA Country Report for Poland for 2020](#).

<sup>908</sup> [AIDA Country Report for Poland for 2020](#).

<sup>909</sup> Asylum in Europe, [Country report Spain: Border procedure \(border and transit zones\)](#), 2021.

	offered. Once an appeal is lodged, the Swedish Migration Court will review the decision of the Migration Agency.
Poland	The Government of Poland has signed agreements with local bus carriers. Under the signed contracts, bus carriers are obliged to assess whether person meets entry conditions under Schengen Borders Code. If they do not but have been driven to the border, the bus carrier is responsible for driving the person back to the place of entry. Consequently, no persons stay at the border. Either they are taken back, or they are admitted to apply for asylum and invited to reception centres. <sup>910</sup>
Germany	N/A
	<i>Improvements to current remedial system</i>
Italy	Applicants placed in detention facilities and applicants whose application is examined under the accelerated procedure, as defined in the 'Security Decrees', have only 15 days to lodge an appeal <sup>911</sup> . There is no automatic suspensive effect <sup>912</sup> .
Spain	N/A
Greece	Access to comprehensive information remains a matter of concern, especially in the context of asylum, due to the expanded set of obligations and penalties that can be imposed on applicants based on the IPA. Challenges include language barriers, the complexity of the procedure and constantly changing legislation and practice, as well as bureaucratic hurdles.
Sweden	N/A
Poland	N/A
Germany	N/A
	<i>Are those submitted to the BP allowed entry in the territory?</i>
Italy	N/A
Spain	While the BP is pending, the applicant has not formally entered Spanish territory, i.e., a fiction of 'non-entry' applies.
Greece	N/A
Sweden	Not applicable
Poland	Not applicable
Germany	N/A
	<i>Accommodation if entry is not allowed</i>
Italy	N/A
Spain	N/A
Greece	N/A
Sweden	Not applicable for BP. However, during the asylum application procedure, applicants are offered housing, legal aid and a monthly allowance.
Poland	Not applicable for BP.
Germany	As a rule, asylum seekers whose applications have been rejected are required to leave the country. <sup>913 914</sup>

<sup>910</sup> Interview with Ministry of Interior, annexed to this report.

<sup>911</sup> Asylum in Europe, [Country report Italy: Short overview of the asylum procedure](#), 2021.

<sup>912</sup> European Asylum Support Office, [Border Procedures for asylum applications in EU+ countries](#), Publications Office, 2020.

<sup>913</sup> Federal Ministry of the Interior, Building and Community: '[Asylum an refugee policy](#)'.

<sup>914</sup> Federal Office for Migration and Refugees '[The stages of the German Asylum procedure](#)'.

	<i>Are they allowed to leave the accommodation facility?</i>
Italy	Detention of asylum seekers for 'identification purposes' is possible, meaning that asylum seekers can be detained for 30 days in a facility (e.g. a hotspot, or a Centre for Repatriation/CPR) if this is deemed necessary to establish the identity or the nationality of the applicant. These measures have remained essentially in place with Decree Law 130/2020, promulgated by Salvini's successor, Luciana Lamorgese. According to the Standard Hotspots Operating Procedures, 'Unless in the case of exceptional influxes of migrants, imposing the adoption of different initiatives, individuals may leave the hotspot only after having been photo-identified in accordance with the regulations in force, if all the security checks in the national and international police databases have been completed'. NGOs and national think tanks highlighted that often, migrants would leave the centres anyways through holes in the fences. Additionally, it was highlighted that these dispositions appeared to be completely illegitimate, as they were 'evidently contrary to existing legislation, which did not provide for the possibility of detaining migrants in such facilities. With the 2018-2019 'Security Decrees', these limitations to individual liberty were effectively regulated by the provisions outlined above with regard to detention for identification purposes.
Spain	According to Spanish Commission for Refugee Aid (CEAR) the Canary Islands have become a new scenario of the migration containment policy, based on retaining migrants in island territories. This impression has been consolidated by one interviewee, who stated that migrants are 'trapped' on the islands and cannot move freely. <sup>915</sup>
Greece	Newly arrived persons transferred to a RIC are subject to a 3-day 'restriction of liberty within the premises of the Reception and Identification Centres' (περιορισμός της ελευθερίας εντός του κέντρου), which can be further extended by a maximum of 25 days if reception and identification procedures have not been completed. This restriction of freedom entails 'the prohibition to leave the Centre and the obligation to remain in it' However, this restriction of freedom does not apply to RICs on the islands (due to limited capacity and national/international criticism) and newly arrived migrants are allowed to leave the centre. <sup>916</sup>
Sweden	Not applicable for BP. During the asylum application process, however, applicants are, in most cases, allowed to move freely within the country.
Poland	According to the Ministry, there is no detention of migrants. The person might either stay in an accommodation facility or in private accommodation. Once an asylum seeker gets into the reception centre, he/she is informed of his rights and obligations and might choose to stay either in an accommodation facility or in private accommodation. The facilities are an 'open type' ones - he/she is not obliged to stay in the accommodation facility and might freely leave it. <sup>917</sup>
Germany	N/A
	<i>Treatment of minors and other vulnerable persons treated in BP</i>
Italy	The Lamorgese Decree established that during BPs, <u>asylum requests put forward by a representative of a vulnerable group and unaccompanied minors are to be examined with priority</u> . Additionally, representatives of these categories <u>cannot be subject to the accelerated BP</u> . The confirmation of the existence of special needs and specific situations of vulnerability, also for the purpose of <u>priority transfer of the applicant to the structures of the Reception and Integration System, and the adoption of appropriate measures of</u>

<sup>915</sup> Interview with representative of national NGO on 6 May 2021.

<sup>916</sup> Greek Council for Refugees, [Country report \(Greece\): GROUNDS FOR DETENTION](#), 2020.

<sup>917</sup> Interview with Ministry of Interior, annexed to this report.

	<p>'first reception' is carried out according to the <a href="#">guidelines</a><sup>918</sup> issued by the Ministry of Health. These guidelines are to be applied in the first reception centres and temporary structures set up when the latter do not have available places.<sup>919</sup> Additionally, in July 2020, the Government signed an agreement with regions and local autonomous institutions on 'Multi-disciplinary Protocol on Age Assessment of Unaccompanied Migrant Children'<sup>920</sup>. The agreement aims to harmonise procedures to assess the age of unaccompanied migrant children, describing how and where the procedure should be carried out and stressing that the level of invasiveness should be kept to a minimum.<sup>921</sup></p>
Spain	<p>Although Spain provides many safeguards for children, the Canary Islands do not have the capacity to protect all of them at the moment because of the sheer numbers (around 300).<sup>922</sup> Article 46(1) of the Asylum Law specifically refers to vulnerable groups in the general protection provisions, stating that the particular situation of the applicant or of persons enjoying international protection shall be taken into account in situations of vulnerability, such as minors, unaccompanied children, persons with disabilities, persons of advanced age, pregnant women, single parents with minor children, persons who have suffered torture, rape or other forms of serious psychological, physical or sexual violence, and victims of trafficking.</p>
Greece	<p>The law provides that, when applying the provisions on reception conditions, competent authorities shall take into account the specific situation of vulnerable persons such as minors, unaccompanied or not, direct relatives of victims of shipwrecks (parents and siblings), disabled people, elderly people, pregnant women, single parents with minor children, persons with serious illnesses, persons with cognitive or mental disability and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, victims of female genital mutilation and victims of human trafficking. The assessment of the vulnerability of persons entering irregularly into the territory takes place within the framework of the Reception and Identification Procedure and, since the entry into force of the IPA, on 1 January 2020, it is no longer connected to the assessment of the asylum application.</p> <p><u>Types of accommodation for unaccompanied children:</u></p> <p>Long- and short-term accommodation facilities for unaccompanied children (shelters) are managed by civil society entities and charities as well as and with the support of IOM. 'Supported Independent Living for unaccompanied minors' is an alternative housing arrangement for unaccompanied children aged 16 to 18 launched in 2018. The programme includes housing and a series of services (education, health etc.) and aims to enable the smooth coming of age and integration to Greek society. Safe zones are designated supervised spaces within temporary open accommodation sites dedicated to unaccompanied children. Hotels are emergency accommodation spaces being used as a measure to care for unaccompanied children in light of the insufficient number of available shelter places. Priority is given to children in RIC.</p>
Sweden	<p>Overall, interviewees noted that asylum applicants receive very good treatment. Added assistance, ensuring full compliance and promotion of fundamental rights for e.g. minors and members of the LGBTQ+ community, is a high priority for the Swedish government.</p>

<sup>918</sup> Ministero della Salute, [Linee guida relative agli interventi di assistenza e riabilitazione, nonché per il trattamento dei disturbi psichici dei rifugiati e delle persone che hanno subito torture, stupri o altre forme gravi di violenza psicologica, fisica o sessuale](#), 2017.

<sup>919</sup> Deputati, [Il Decreto-Legge N. 130 Del 2020: Il Nuovo Decreto Immigrazione](#), 2020.

<sup>920</sup> Presidenza del Consiglio dei Ministri, [La Conferenza Unificata](#), 2020.

<sup>921</sup> FRA, [Migration: Key Fundamental Rights Concerns](#), 2020.

<sup>922</sup> Interview with a representative of a national NGO on 6 May 2021.

Poland	Special accommodation centres for minors and other vulnerable groups exist (such as young mothers with children)
Germany	Germany took steps to create safe housing options for particularly vulnerable people and to decongest existing migration reception centres during the pandemic.
	<i>General good practices</i>
Italy	N/A
Spain	N/A
Greece	N/A
Sweden	All interviewees highlighted the high level of rights and benefits provided to asylum applicants during the application procedure as being particularly good practice in the case of Sweden.
Poland	According to the Ministry of Interior, the Polish asylum procedure is swift and well. The good practice to be shared is good cooperation with Eastern countries, such as Belarus and Ukraine.
Germany	N/A
	<i>General bad practices</i>
Italy	A lack of awareness of migrants and asylum seekers with regard to their condition, rights and the legal situation was highlighted in 2017 in a report by the National Guarantor of the rights of detainees and persons deprived of their liberty <sup>923</sup> . Overall, the practice of administrative detention has been criticised for 'lacking legitimacy, having an ambiguous nature - formally administrative but substantially criminal - the material conditions of detention, as well as the violation of the rights of defence and the habeas corpus of migrants'. With regard to vulnerable people, and in particular with an eye to the hotspot facilities during BPs, a July 2020 report by Refugee Rights Europe <sup>924</sup> highlights that 'reception facilities are not equipped to provide aid to vulnerable people, and the system of identification of people experiencing [trafficking of human beings] is lacking, [therefore risking] to expel people who risk being subjected to inhuman and degrading treatment, as well as torture'.
Spain	Applications at borders and in CIEs are, in general, likely to be rejected or dismissed as inadmissible compared to applications filed on the territory, which increases the vulnerability of the applicants concerned. This fact has been highlighted by several organisations in Spain, which denounce the low number of admissions in the BP compared to the ordinary procedure, and has also been supported by the jurisprudence of the Supreme Court. CEAR in the Canary Islands emphasises that the increase in arrivals in the last months of 2020 led to the repeated violation of Spanish law with arrests and detention without legal protection, lack of legal assistance to migrants and, because of this, there was a lack of attention to children travelling alone, potential victims of trafficking or potential asylum seekers. <sup>925</sup>
Greece	Shortages in the Identification of vulnerabilities, together with a critical lack of reception places on the islands, prevent vulnerable people from enjoying special reception conditions. This could also be the case on the mainland due to the limited capacity of facilities under the National Centre for Social Solidarity (EKKA), the lack of a clear referral pathway to access temporary camps and the poor reception conditions reported in many of those.

<sup>923</sup> Open Migration, [Come in carcere, ma senza I diritti dei detenuti](#), 2017.

<sup>924</sup> Refugee Rights Europe, [A reluctant welcome: Exploring issues of pushbacks, treatment in detention and living conditions for displaced people in Italy](#), 2020.

<sup>925</sup> Comisión Española de Ayuda al Refugiado, [Informe: Migración en Canarias, la emergencia previsible](#), 2021.

Sweden	Although generally avoided, the use of detention in certain cases is highlighted as an issue by some interviewees.
Poland	There are cases both of adults and children detention. The courts rely on motions issued by Border Guard for detention, without a proper assessment of individual circumstances and regardless of the best interest of the child. Experts' opinion are very rarely requested and psychological opinions stating that detention has a negative impact on the child's well-being are disregarded in practice. Children cannot exercise their right to be heard as they are not involved in detention proceedings. Moreover, detention is not ruled for the shortest period of time, and there are little efforts to reduce the duration of detention of children. <sup>926</sup>
Germany	N/A
	<i>Evidence of efficient BP</i>
Italy	N/A
Spain	N/A
Greece	N/A
Sweden	Not applicable for BP. High evidence of an efficient asylum application procedure, as suggested by the high number of case-officers trained and resources provided to specifically ensure an efficient system. Data from 2019 shows that at least 50 % of all cases were processed within 30 days.
Poland	N/A
Germany	N/A

Source: Ecorys, on the basis of data from country research, 2021.

## B.5 Questionnaire Economic Impact Assessment

### B.5.1 Backward-looking questions

Please fill in for your organisation the total cost and the number of asylum seekers involved in various measures that your organisation was involved in. If your organisation was not involved in measures, please fill in **zeros**.

Please provide estimates for a 'crisis' year in **number of asylum seekers** (for example, the year 2015) and a 'normal' year (for example, the year 2020).

With the measures in the table below, we mean the following. If no data are available on parts of the measure, please indicate which parts are included.

- **Cost of return flights** (to country of origin): Cost of flight ticket or chartering a flight, cost of escort, money for the migrant to incentivise their return;
- **EU border checks personnel costs**: costs of personnel checking the health and identity of people crossing the EU outside border;
- **EU border checks infrastructure**: checkpoints, equipment for biometric tests, information system with access to EU databases;
- Costs of dispersing persons at EU border crossing points (Calais, Ventimiglia): transport costs, escort costs;
- **Legal infrastructure**: developing laws, asylum seeker procedures, IT systems etc. (only for a normal year);

<sup>926</sup> [AIDA Country Report for Poland for 2020](#).

- **National legal procedures:** cost of asylum and return procedure, appeals, cost of proving compliance with procedures ('administrative costs'), compensation to asylum seekers for procedural errors;
- **Dublin requests:** cost of personnel handling outgoing or incoming requests or taking charge of requests following the Dublin criteria;
- **Dublin transfers:** tickets, escorts;
- **Reception / detention centre infrastructure:** cost of construction, annual rent or lease, mortgage (only for a normal year). With reception / detention centre we mean any centre or other housing for asylum seekers;
- **Reception / detention centre operational:** cost of maintenance, administration and living costs during asylum seeker procedure;
- **Crisis framework:** cost of setting up tent camps, emergency food distribution, emergency health check facilities etc. (only for a crisis year);
- **Integration:** cost of language courses, integration courses, training in qualifications etc.

Please include both staff/overhead/operational costs and payments to other organisations. We only need to know the total of all costs, but please indicate to which other organisations you paid costs to avoid double counting of costs.

Measure	Relevant parts (please cross out which you have no data on)	Type of persons involved	Cost and numbers in a crisis year (2015)		Cost and numbers in a normal year (2020)	
			Expenses	Nr persons involved	Expenses	Nr persons involved
Cost of return flights (to country of origin)	Costs of flight tickets or chartering a flight Cost of escort Money for migrant to incentivise their return	Rejected asylum applicants				
EU border checks personnel	Medical staff to check health Administrative staff to check identity, criminal record	Number of staff				
EU border checks infrastructure	Checkpoints Equipment for biometric tests IT system Other, namely ...	Not applicable		XXX		XXX
Dispersing persons from intra-EU borders	Transport costs Escort costs Other, namely ...	Asylum seekers				
Legal infrastructure	Developing laws Revising procedures IT systems	Policy officers	XXX	XXX		

Measure	Relevant parts (please cross out which you have no data on)	Type of persons involved	Cost and numbers in a crisis year (2015)		Cost and numbers in a normal year (2020)	
			Expenses	Nr persons involved	Expenses	Nr persons involved
National legal procedures	Personnel/overhead cost of asylum and return procedure including appeals Cost of proving compliance with procedures (e.g. accountants, consultants) Compensation for procedural errors	Court / asylum body personnel				
Dublin requests (outgoing and incoming)	Personnel / overhead costs of processing outgoing / incoming take back / take charge requests	Handling personnel				
Dublin transfers	Transport ticket costs Cost of escort	Asylum seekers				
Reception / detention centre infrastructure	Cost of construction Cost of rent or lease Cost of mortgage	Not applicable		XXX		XXX
Reception / detention centre operational	Maintenance of centres Administration costs Asylum seeker living costs	Reception / detention centre staff				
Crisis framework	Tent camps Emergency food distribution Emergency health check facilities Other, namely ...	Asylum seekers			XXX	XXX
Integration	Language courses Integration courses Training in qualifications Other, namely...	Admitted asylum seekers				

Additional questions for the economic impact assessment (relevant national ministry only):

- Numbers of admitted adult asylum seekers by qualification level (by year, or most recent year) by skills level:
  - Upper secondary / craft worker or higher;
  - Lower secondary or lower / unskilled worker.
- Employment rate of admitted (adult) asylum seekers by qualification level;
- Average age of adult asylum seekers.

### ***B.5.2 Forward-looking questions***

#### **Mandatory border procedures**

The proposed new pact would shorten the deadline for the asylum procedure to 12 weeks, and in addition, shorten the deadline for the procedure to return migrants to the country of origin to 12 weeks, on top of the asylum procedure.

**A: Can you please estimate the expected effects of the 12-week deadlines for your organisation, for example, additional staff costs?**

**A 1:** What do you think will be the impact on the numbers of admitted asylum seekers, for example, if deadlines are not met or are not met, respectively?

**A 2:** A fast-track procedure for asylum seekers with little chance of being admitted given their country of origin would be 12 weeks in total. What would be the main impacts? A savings in procedure time, fewer admitted asylum seekers, etcetera?

Percentage estimates compared to the current situation would also be acceptable.

#### **Suggested border facilities**

**B: The new new pact would require adequate accommodation in reception centres**

**B1:** What would complying with such minimum requirements involve for your countries?

**B2:** Are current facilities sufficient, would they need to be adjusted, or would new centres need to be built?

**B3:** And what would be the associated cost of meeting those minimum requirements for current numbers of asylum seekers?

#### **Screening procedure**

The proposed new pact would specify further minimum requirements for border crossing points and reception centres such as: Access to identity databases at the premises, medical staff and equipment for the preliminary health checks and independent monitoring mechanisms of **fundamental** rights during the screening.

**C1:** What would complying with such minimum requirements involve for your countries?

**C2:** Are current facilities sufficient, would they need to be adjusted, or would new centres need to be built?

**C3:** And what would be the associated cost of meeting those minimum requirements for current numbers of asylum seekers?

## Relocation operations

The proposed new pact would specify criteria to determine responsibility: firstly, children, secondly, other family of asylum seekers, thirdly if a country has issued a residence document or a visa, fourthly if an educational institute issued a diploma or qualification, and lastly, the country of first entry provided that the application of the migrant is registered within three years of irregular entry. The current deadline of 18 months for shifting responsibility if a transfer is not carried out in 18 months will be deleted.

- D1:** What percentage of take-back and/or take charge procedures do you estimate that currently exceed the deadline of 18 months, respectively?
- D2:** What do you estimate will be the effect on the number of outgoing take-back and/or take charge procedures and transfers, respectively?
- D3:** What do you estimate will be the effect on the number of incoming take-back and/or take charge procedures and transfers, respectively?

For a) and b) percentage estimates compared to the current situation would also be acceptable.

## Immediate protection

The proposed new pact would specify that under certain conditions, asylum seekers may be granted immediate protection without going through the procedure to determine the subsidiary protection status. The difference with the current temporary protection is that asylum seekers would be granted the same rights as beneficiaries of subsidiary protection. These rights would be the same as for refugees regarding family unity, travel documents, access to employment, healthcare and integration, and less than for refugees with regard to the length of stay and access to social assistance.

- E1:** How many asylum seekers at the border do you estimate could be granted immediate protection? Which types of procedural costs would this save, and which types of additional integration costs or other costs would this involve?
- E2:** What would be the associated costs and benefits for, say, 1,000 grants of immediate protection?

A percentage estimate would also be acceptable in this case, for example, the % change compared to current numbers of migrants receiving temporary protection.

## Crisis framework

When numbers of asylum seekers are extremely high, the additional numbers would be allocated to Member State on the main basis of the population size. However, countries may invest in facilities in countries of first entry, such as Greece and Italy. An indicative size of the investment is EUR 10,000 per asylum seeker. So, the cost of not processing the asylum requests of 10,000 persons allocated to one Member State would be EUR 100 million.

- F1:** Do you expect the crisis framework allocations to go smoothly, or do you expect legal procedures?
- F2:** Would your country invest in facilities in countries of first entry instead of building emergency centres, emergency food supply, etcetera?

### **Return sponsorship**

If one country has difficulties returning rejected asylum seekers to the country of origin, other countries may be required to take over the attempt to return asylum seekers. For example if Italy has difficulty returning asylum seekers to Tunisia and France has good relationships with Tunisia, France would be required to attempt to return those asylum seekers to Tunisia. If France not succeed in eight months, France would have to take over those rejected asylum seekers from Italy.

**G1:** Do you expect the return sponsorships to go smoothly, or do you expect legal procedures?

**G2:** Would your country offer voluntarily to sponsor the return for other Member States under certain conditions and if yes which?

## Annex C. List of indicators

Process	Economic Impact	Social Impact	Fundamental Rights	Territorial Impact
Pre-arrival The process before an asylum seeker arrives at the border		Protection from crime, including human trafficking Provision of safe pathways for migrants and asylum seekers	Safeguarding of the Right's of the Child Non-refoulement Protection of life (search and rescue)	Increased burden on frontline Member States for border surveillance (sea borders)
Pre-entry screening Describes the screening process, including background and health checks	Cost of setting up border facilities Costs for staff and IT infrastructure Accommodation for TCNs submitted to the screening	Provision of social protection for migrants Access to public health Impact of large reception facilities on local communities	Legal fiction of non-entry Detention Delayed access to the asylum procedure Risk of racial profiling Data protection Protection and promotion of migrants' procedural rights (effective remedy; right to information; written decision; legal aid; translation; legal certainty) Protection of dignity (adequate reception conditions; mental health) Impact on vulnerable groups	Harmonization of pre-entry procedures in view of divergent geographies (Member State coastal borders, Member State without external land or sea borders) Impact of large reception (or detention) facilities in border areas (frontline Member States)
Border Procedures:		Access to social services of applicants according to	Ability for asylum seekers to exit border facilities	Same as for screening

Process	Economic Impact	Social Impact	Fundamental Rights	Territorial Impact
process in which decision-makers decide on application for international protection before entry is granted, including return border procedures		<p>Reception Conditions Directive</p> <p>for the others, see under screening</p> <p>vulnerable groups</p> <p>Assistance received from civil society groups/actors in asylum and border procedures</p> <p>Ability for migrants to integrate across different locations of reception (including economic and social integration)</p>	<p>Ability to move freely within the country (freedom of movement)</p> <p>Use of (prolonged) detention</p> <p>De facto detention without a legal basis and no appeal)</p> <p>Non-discrimination (recognition rate of 20 %)</p> <p>Effective remedies for migrants (shortened time limits for appeal)</p> <p>Non-refoulement in return procedures (extending beyond the criteria under the Refugee Convention)</p> <p>Protection of best interest of the child, family life in return procedures</p> <p>Impact on internal monitoring of Member State / accountability of Member State towards upholding the fundamental rights of migrants</p>	<p>Non-returnable migrants stuck at the external borders</p> <p>Mandatory use of border procedures for frontline Member States</p>
Solidarity: Relocation/return sponsorship/capacity	<p>Transfers to the Member State sponsoring return</p> <p>Economic incentives for relocation</p>	<p>The impact on family life and/or reunification, including on the rights of the child</p>	<p>Detention in return sponsorship</p>	<p>Territorial efficiency: Adequate measures to ensure a fairer distribution of applicants across Member States</p>

Process	Economic Impact	Social Impact	Fundamental Rights	Territorial Impact
building/support in cooperation with third countries		<p>Secondary movements to avoid being relocated/to leave the country of relocation</p> <p>Ability to integrate in the Member State of relocation</p> <p>Improved reception standards/asylum processing because of capacity building</p> <p>lack of safe and legal pathways to the EU</p>	<p>Accountability for return procedures and lawfulness of coercive measures</p> <p>Non-refoulement</p> <p>Accountability for violation of HR committed in cooperation with third countries</p>	<p>Impact on Member State willingness to comply with quotas / take in migrants</p> <p>Extraterritorial reach of EU law and policies</p>
<p>Responsibility (Dublin): rules on the attribution of responsibility for asylum</p> <ul style="list-style-type: none"> <li>- new rules on the shift and cessation of responsibility will bear on first country of entry, producing an increase in the number of take back requests (staff and procedural costs)</li> <li>- reduced time limits for take back and take-charge procedures are likely to have a significant economic cost (staff and procedural costs)</li> <li>- the number of transfers will likely increase (detention, escorts)</li> </ul>	<p>Staff and procedural costs for processing take back/take charge requests</p> <p>costs related with transfers (detention, escorts, means of transport)</p>	<p>Ability for migrants to integrate across different locations of reception (including economic and social integration)</p>	<p>Protection of best interest of the child, family life in the determination of the Member State responsible</p> <p>Detention pending the transfer from a Member State to another</p> <p>protection of dignity (transfers to Member State with poor reception standards)</p>	<p>How the new rules will impact on the distribution of Asylum Seekers across Member States</p>

Process	Economic Impact	Social Impact	Fundamental Rights	Territorial Impact
Pre-arrival The process before an asylum seeker arrives at the border		Protection from crime, including human trafficking Provision of safe pathways for migrants and asylum seekers	Safeguarding of the Right's of the Child Non-refoulement Protection of life (search and rescue)	Increased burden on frontline Member States for border surveillance (sea borders)
Pre-entry screening Describes the screening process, including background and health checks	Cost of setting up border facilities Costs for staff and IT infrastructure Accommodation for TCNs submitted to the screening	Provision of social protection for migrants Access to public health Impact of large reception facilities on local communities	Legal fiction of non-entry Detention Delayed access to the asylum procedure Risk of racial profiling Data protection Protection and promotion of migrants' procedural rights (effective remedy; right to information; written decision; legal aid; translation; legal certainty) Protection of dignity (adequate reception conditions; mental health) Impact on vulnerable groups	Harmonization of pre-entry procedures in view of divergent geographies (Member State coastal borders, Member State without external land or sea borders) Impact of large reception (or detention) facilities in border areas (Mmember States)

Source: Ecorys, 2021.

## Annex D. Impact assessment tables territorial impact Chapter 6

Estimated number of asylum seekers subject to the border procedure in a migration scenario similar to 2015-2017 - GREECE					
Citizenship of applicants	Number of asylum applications 2015-2017 (yearly average)	%	EU recognition rate in 2020	Subject to border procedure Y/N	Number of AS likely to be subject to the border procedure
Syria	15532	37,9 %	85 %	N	
Pakistan	5148	12,6 %	11 %	Y	5148
Afghanistan	4553	11,1 %	58 %	N	
Iraq	4465	10,9 %	43 %	N	
Albania	1627	4,0 %	5 %	Y	1627
Bangladesh	1113	2,7 %	7 %	Y	1113
Iran	885	2,2 %	31 %	N	
Palestine	740	1,8 %	51 %	N	
Georgia	727	1,8 %	4 %	Y	727
Turkey	687	1,7 %	43 %	N	
Algeria	607	1,5 %	5 %	Y	607
Egypt	548	1,3 %	12 %	Y	548
Democratic Republic of the Congo	478	1,2 %	25 %	N	
Stateless	403	1,0 %	54 %	N	
Morocco	337	0,8 %	10 %	Y	337
Eritrea	297	0,7 %	81 %	N	
Cameroon	283	0,7 %	23 %	N	
Nigeria	282	0,7 %	17 %	Y	282
China including Hong Kong	183	0,4 %	59 %	N	
Somalia	155	0,4 %	60 %	N	
Others	1942	4,7 %	/	/	
<b>Total yearly average</b>	<b>40992</b>	<b>100 %</b>			<b>10388</b>

**Elaboration on Eurostat data**

Estimated number of asylum seekers subject to the border procedure in a migration scenario similar to 2018-2020 - GREECE					
Citizenship of applicants	Number of asylum applications 2018-2020 (yearly average)	%	EU recognition rate in 2020	Subject to border procedure Y/N	Number of AS likely to be subject to the border procedure
Afghanistan	15757	25,6 %	58 %	N	
Syria	10670	17,3 %	85 %	N	
Pakistan	6343	10,3 %	11 %	Y	6343
Iraq	5715	9,3 %	43 %	N	
Turkey	3413	5,5 %	43 %	N	
Albania	2570	4,2 %	5 %	Y	2570
Democratic Republic of the Congo	2335	3,8 %	25 %	N	
Bangladesh	1940	3,1 %	7 %	Y	1940
Iran	1682	2,7 %	31 %	N	
Palestine	1650	2,7 %	51 %	N	
Somalia	1512	2,5 %	60 %	N	
Georgia	1313	2,1 %	4 %	Y	1313
Egypt	1232	2,0 %	12 %	Y	1232
Cameroon	778	1,3 %	23 %	N	
Algeria	577	0,9 %	5 %	Y	577
Morocco	300	0,5 %	10 %	Y	300
China including Hong Kong	297	0,5 %	59 %	N	
India	287	0,5 %	2 %	Y	287
Eritrea	282	0,5 %	81 %	N	
Stateless	268	0,4 %	54 %	N	
Others	2687	4,4 %	/	/	
<b>Total yearly average</b>	<b>61607</b>	<b>100 %</b>			<b>14562</b>
<b>Elaboration on Eurostat data</b>					

Estimated number of asylum seekers subject to the border procedure in a migration scenario similar to 2015-2017 - ITALY					
Citizenship of applicants	Number of asylum applications 2015-2017 (yearly average)	%	EU recognition rate in 2020	Subject to border procedure Y/N	Number of AS likely to be subject to the border procedure
Nigeria	23582	21,1 %	17 %	Y	23582
Pakistan	11272	10,1 %	11 %	Y	11272
Gambia, The	8600	7,7 %	12 %	Y	8600
Bangladesh	8378	7,5 %	7 %	Y	8378
Senegal	7475	6,7 %	11 %	Y	7475
Mali	6472	5,8 %	25 %	N	
Côte d'Ivoire	6328	5,7 %	20 %	N	
Guinea	5182	4,6 %	22 %	N	
Eritrea	4820	4,3 %	81 %	N	
Ghana	4683	4,2 %	9 %	Y	4683
Ukraine	3327	3,0 %	11 %	Y	3327
Afghanistan	2612	2,3 %	11 %	Y	2612
Somalia	1708	1,5 %	60 %	N	
Cameroon	1440	1,3 %	23 %	N	
Morocco	1332	1,2 %	10 %	Y	1332
Iraq	1232	1,1 %	43 %	N	
Syria	987	0,9 %	85 %	N	
El Salvador	877	0,8 %	21 %	N	
Guinea-Bissau	1332	1,2 %	10 %	Y	1332
Burkina Faso	732	0,7 %	28 %	N	
Others	9973	8,9 %	/	/	
<b>Total yearly average</b>	<b>111785</b>	<b>100 %</b>			<b>72592</b>

**Elaboration on Eurostat data**

Estimated number of asylum seekers subject to the border procedure in a migration scenario similar to 2018-2020- ITALY					
Citizenship of applicants	Number of asylum applications 2018-2020 (yearly average)	%	EU recognition rate in 2020	Subject to border procedure Y/N	Number of AS likely to be subject to the border procedure
Pakistan	7575	17,4 %	11 %	Y	7575
Nigeria	4548	10,5 %	17 %	Y	4548
Bangladesh	3693	8,5 %	7 %	Y	3693
El Salvador	1942	4,5 %	21 %	N	
Senegal	1812	4,2 %	11 %	Y	1812
Ukraine	1772	4,1 %	11 %	Y	1772
Morocco	1332	3,1 %	10 %	Y	1332
Peru	1308	3,0 %	5 %	Y	1308
Gambia, The	1297	3,0 %	12 %	Y	1297
Mali	1225	2,8 %	25 %	N	
Venezuela	1212	2,8 %	95 %	N	
Albania	1103	2,5 %	5 %	Y	1103
Côte d'Ivoire	1038	2,4 %	20 %	N	
Tunisia	928	2,1 %	5 %	Y	928
Georgia	877	2,0 %	4 %	Y	877
Iraq	860	2,0 %	43 %	N	
Ghana	758	1,7 %	9 %	Y	758
India	737	1,7 %	2 %	Y	737
Guinea	723	1,7 %	22 %	N	
Colombia	667	1,5 %	2 %	Y	667
Others	8018	18,5 %	/	/	
<b>Total yearly average</b>	<b>43425</b>	<b>100 %</b>			<b>28407</b>
<b>Elaboration on Eurostat data</b>					

Estimated number of asylum seekers subject to the border procedure in a migration scenario similar to 2015-2017 - SPAIN						
Citizenship of applicants	Number of asylum applications 2015-2017 (yearly average)	%	EU recognition rate in 2020	Subject to border procedure Y/N	Number of AS likely to be subject to the border procedure	Of which likely to arrive by sea
Venezuela	5807	25,9 %	95 %	N		
Syria	4298	19,2 %	85 %	N		
Ukraine	2725	12,2 %	11 %	Y	2725	
Colombia	1517	6,8 %	2 %	Y	1517	
Algeria	862	3,8 %	5 %	Y	862	862
Palestine	828	3,7 %	51 %	N		
El Salvador	653	2,9 %	21 %	N		
Honduras	617	2,8 %	13 %	Y	617	
Morocco	447	2,0 %	10 %	Y	447	447
Cameroon	297	1,3 %	23 %	N		
Mali	260	1,2 %	25 %	N		
Nigeria	253	1,1 %	17 %	Y	253	253
Guinea	250	1,1 %	22 %	N		
Russia	218	1,0 %	21 %	N		
Dominican Republic	190	0,8 %	12 %	Y	190	
Côte d'Ivoire	183	0,8 %	20 %	N		
Pakistan	183	0,8 %	11 %	Y	183	183
Georgia	158	0,7 %	4 %	Y	158	
China including Hong Kong	153	0,7 %	59 %	N		
Iraq	147	0,7 %	43 %	N		
Others	2337	10,4 %	/	/		
<b>Total yearly average</b>	<b>22383</b>	<b>100 %</b>			<b>6952</b>	<b>1745</b>

Elaboration on Eurostat data

**Estimated number of asylum seekers subject to the border procedure in a migration scenario similar to 2015-2017 - SPAIN**

Citizenship of applicants	Number of asylum applications 2018-2020 (yearly average)	%	EU recognition rate in 2020	Subject to border procedure Y/N	Number of AS likely to be subject to the border procedure	Of which likely to arrive by sea
Venezuela	29503	34,0 %	95 %	N		
Colombia	21810	25,1 %	2 %	Y	21810	
Honduras	4905	5,7 %	13 %	Y	4905	
Nicaragua	3670	4,2 %	25 %	N		
Peru	3220	3,7 %	5 %	Y	3220	
El Salvador	3185	3,7 %	21 %	N		
Ukraine	1832	2,1 %	11 %	Y	1832	
Syria	1830	2,1 %	85 %	N		
Morocco	1645	1,9 %	10 %	Y	1645	1645
Mali	1158	1,3 %	25 %	N		
Georgia	1128	1,3 %	4 %	Y	1128	
Algeria	1112	1,3 %	5 %	Y	1112	1112
Cuba	1108	1,3 %	9 %	Y	1108	
Palestine	920	1,1 %	51 %	N		
Guinea	697	0,8 %	22 %	N		
Senegal	650	0,7 %	11 %	Y	650	650
Brazil	643	0,7 %	8 %	Y	643	
Pakistan	633	0,7 %	11 %	Y	633	
Russia	625	0,7 %	21 %	N		
Tunisia	547	0,6 %	5 %	Y	547	547
Others	5983	6,9 %	/	/		
<b>Total yearly average</b>	<b>86805</b>	<b>100 %</b>			<b>39233</b>	<b>3953</b>

Elaboration on Eurostat data

## Annex E. Economic Impact assessment calculations

### E.1 Pre-screening procedures

- The mandatory border procedures and the minimum reception conditions create net benefits for all countries, of about EUR 500 million at the EU level;
- The new EU definition of 'safe' countries as those from which less than 20% are recognized, combined with reduced deadlines and the limitation of appeals in the mandatory border procedures, achieves benefits of up to EUR 500 million at the EU level by returning rejected asylum seekers faster (without increasing the rate of return);
- The provision that applicants living in a family with children below age 12 do not enter the mandatory border procedure reduces the number of likely detentions by 50%. Without this provision, the pre-screening measures in the new pact would have resulted in net costs instead of net benefits for frontline Member States (Greece, Italy, Spain);
- The debriefing form that national authorities need to prepare is costly and benefits could not be quantified due to lack of data. The data that would need to be collected for EASO does not seem to exceed current data requirements to monitor the CEAS. The cost of monitoring human rights could not be estimated due to lack of specific information on what monitoring is required;
- Without specifying minimum requirements for independent monitoring of fundamental rights during the pre-screening procedures, just giving organisations like Amnesty International, access to reception centres could be interpreted as sufficient compliance, which would involve little or no extra costs.

The new measures in the new pact that are assessed to have the largest economic impacts include:

- The introduction of a new EU definition of 'safe' countries and the non-entry fiction for applicants from these countries (under the mandatory border procedure). Among its effects with substantial changes in costs and benefits are the need to replace open reception centres with closed centres to comply with the non-entry fiction and the reduced likelihood of secondary movements during the mandatory border procedures;
- The requirement of a debriefing form that describes amongst others the route and the people facilitating the move to Europe;
  - The requirement of collecting biometric data during the screening procedure;
  - Minimum requirements for reception facilities, causing direct costs where these facilities are currently 'inadequate' and potentially lifting the ban to transfer asylum seekers back to Greece;
  - Reduced durations of the mandatory border procedures.

The economic impact assessment relies entirely on public sources and public reports. It assumes that all new measures in the new pact are implemented, for example, that Greece will invest in adequate accommodation for asylum seekers. In addition to estimated annual total costs for groups of countries, costs per asylum seeker are presented because their numbers vary strongly between years, and costs per inhabitant are presented to make the costs and benefits more comparable between countries.

The non-entry fiction implies that closed reception centres need to be built to replace open centres. The requirement of minimum reception conditions and the cost of a debriefing form that national authorities need to prepare themselves for additional costs. These costs apply to all Member States,

but most of all to frontline Member States and preferred destination countries (which also receive many asylum seekers via their airports). Improved reception conditions in Greece would also imply that Dublin take-back transfers to that country are no longer banned. The collection of biometric data in Eurodac further shifts costs from preferred destination countries to frontline Member States due to increased numbers of Dublin take-back transfers because it helps determine the responsible country more effectively and because a Eurodac hit counts as evidence.

On the benefit side, the reduced number of secondary movers due to the non-entry fiction will create efficiencies in the form of a reduced number of Dublin take-back requests. The reduced deadlines in the mandatory border procedures and the limitation of the appeal option compared to the normal procedures create further efficiencies. Without the debriefing form requirement, the benefits would outweigh the cost at the EU level, though only preferred destination countries actually benefit. Unfortunately, the economic assessment of the debriefing form is hindered by uncertainty about its benefits.

The new pact requires independent human rights monitoring during pre-screening procedures but does not provide minimum requirements. It only provides that an EU agency will be tasked with providing the minimum requirements. If a country would currently have a system of independent human rights monitoring, it would not need to change anything, and if a country does not have it, it seems likely that it would seek to comply with the human rights monitoring requirement at the lowest possible cost (otherwise it would have an independent monitoring system already). The lowest cost to comply with the requirement of independent monitoring would be to give organisations like Amnesty International access to asylum seekers what would involve little or no cost. So without knowing what the minimum requirements for independent human rights monitoring will be, the cost cannot be estimated, but it seems wise to assume that countries will seek to comply with the lowest additional cost possible.

Table E.1: Overview of estimated total costs and benefits of proposed measures regarding pre-screening procedures (in EUR mln, per normal year)

		Total	FL	BR	PD	OC
A	Cost of non-entry (closed instead of open centres), pessimistic scenario	-91	-11	0	-71	-9
B	Cost of minimum reception conditions requirements, pessimistic scenario	-229	-144	-4	-78	-3
C	Cost change due to increased Dublin transfers to Greece	-19.6	-31.4	0.0	11.8	0.0
D	Cost change due to biometric data collection	-44.2	-68.1	-3.6	42.8	-15.3
E	Costs of debriefing form	-127.6	-40.9	-3.1	-80.0	-3.6
F	Benefits of reduced number of secondary movers due to non-entry fiction	21	3	0	18	0

		Total	FL	BR	PD	OC
G	Benefits of reduced deadlines of border procedures	543	257	0	268	19
H	Costs of independent fundamental rights monitoring	Unknown	Unknown	Unknown	Unknown	Unknown
I	Benefits of more effective deployment of Frontex staff (if debriefing form is shared with them)	Unknown	Unknown	Unknown	Unknown	Unknown
I = sum(A:G)	Net benefit	54	-36	-10	112	-12

FL, BR, PD, OC: FL = countries of 'frontline' Member States (Greece, Italy, Spain), BR = 'Balkan Route' Member States (Bulgaria, Croatia, Slovenia, Hungary, Austria), PD = 'Preferred Destination' countries (Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Netherlands, Sweden), OC = Other (less affected) Member States.

Sources: Eurostat (nr asylum seekers, returns, Dublin procedures), EMN Ad hoc query on costs (2017), other desk research

First of all, the mandatory border procedure requires that asylum seekers from countries from which less than 20 % of the applicants are recognized are denied entry during the mandatory border procedure. This requires the construction of closed reception centres or the adaption of open centres to closed ones. This, in addition, requires guards, not only to keep the asylum seekers in the reception centre but also to move them to courts and back. In the Netherlands, the number of staff of asylum detention centre personnel to detained asylum seekers is 1:2,<sup>927</sup> and with a cost of 13 weeks per applicant (1-week screening, 12 weeks fast-track procedure), the cost of guards is EUR 3,714 in the Netherlands, based on a salary of EUR 25,000 per year and 30 % employer social security contributions, and assuming that the guards are hired on a need-basis (with fewer guards in the winter than in the summer).

The proposed measures also require adequate accommodation standards. The costs of complying with adequate accommodation standards is discussed further below. If existing accommodation is already adequate, however, the cost of adapting an open centre to a closed centre is likely limited. Even though asylum seekers in mandatory border procedures need to be kept in closed centres to comply with the non-entry fiction, a closed centre is not necessarily a prison. It could be an enclosed area with a supermarket, allowing asylum seekers to buy and prepare their own food, thus saving substantial costs to prepare and deliver food. Enclosing a reception centre in the middle of a town may be impossible, but remote areas may lead to high transportation costs to and from the courts. Nevertheless, assuming a perimeter wall with barbed wire suffices, the cost is estimated at EUR 500 per meter. With 2,000 meters around a centre for 250 asylum seekers (4 floors high), the cost would be EUR 1 million. Add the cost of a gate, a guardhouse, possibly and parking area, and the assumed cost of adapting an open centre could be limited to EUR 2 million per 250 asylum seekers. Assuming that the perimeter wall and other necessary addition last 30 years and that two asylum seekers per

<sup>927</sup> [Number of staff of detention centres \(NL\)](#).

year use the same capacity slot,<sup>928</sup> the cost would be EUR 133 per asylum seeker. However, this is an extremely low-cost scenario. In case a new closed centre needs to be built to replace an open centre, the cost would be about twenty times as high.<sup>929</sup>

For this study, a survey on costs was developed and sent out to six countries, but none responded in time. Detailed cost data were difficult to find, and hence generally based on what could be found in one or two countries. An 'adequate' reception centre costs EUR 33 million in the Netherlands for 250 persons.<sup>930</sup> Assuming that applicants do not stay longer than the pre-screening period of 5 days plus the 12 weeks of the fast-track procedure (13 weeks in total), one closed accommodation can be used for four applicants per year if asylum seekers arrive evenly in each season. However, since most asylum seekers tend to arrive in the summer, one closed accommodation can more likely be used for only two asylum seekers. Assuming furthermore that a reception centre lasts 30 years, the cost per asylum seeker would be EUR 2,200 in the Netherlands.<sup>931</sup> According to Dutch data, one staff member in detention centres is needed for every two illegally staying migrants. The equivalent cost per applicant is EUR 3,714. The Dutch costs of a reception centre per asylum seeker are adjusted according to purchasing power parities for each EU Member State and multiplied with the number of asylum seekers in that country.

The closed centres are mostly needed for asylum seekers from countries from which less than 20 % of the applicants are recognized. Based on Eurostat data on approved asylum requests (in first instance or appeal) per country of origin, this concerns roughly one-third of asylum applicants in 'normal' years at the EU level, but 42% in the group of frontline Member States (Greece, Italy and Spain). These frontline Member States receive 240,000 asylum seekers per year combined, and thus 100,000 from countries with a low recognition rate. Currently, these three countries have a capacity of 28,000 places near the border. Assuming that these are closed centres or can easily be turned into a closed centre, and assuming that each place can be used for two applicants per year, an additional 22,000 places need to be enclosed or replaced. With a cost of EUR 3,848 per applicant per year to enclose open centres or EUR 5,194 per applicant per year to replace open centres (including both construction costs and staff to guard and move applicants to courts and back), this results in EUR 7 million for the frontline Member States combined in the optimistic estimate (enclosing open centres) to EUR 11 million in the pessimistic estimated (replacing open centres). Over the assumed lifespan of 30 years, the cost would be EUR 217 to 335 million for these three countries. Per head of the population of Greece, Italy, and Spain combined, the costs are EUR 0.06 to 0.09 per year. The additional costs that the new pact would cause are relatively low because of the relatively high detention capacity in these countries.

For the preferred destination countries in the northwest of Europe, it is assumed that they are the country of first entry for half of the first-time applicants. An assumption is needed because no data are available about secondary movements.<sup>932</sup> However, DG HOME indicated in an interview that half

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<sup>928</sup> The fast-track border procedure lasts only 12 weeks, so if asylum seekers arrive evenly through the year, turnover per capacity slot could be 4, however most asylum seekers arrive in the summer and hence a turnover of 2 asylum seekers per capacity slot is more realistic

<sup>929</sup> As discussed further below, EUR 33 million for 250 asylum seekers, or EUR 2,200 per asylum seeker if the centre lasts 30 years and turnover is 2 persons per capacity slot.

<sup>930</sup> Kamerstuk, [Wijziging van de begrotingsstaten van het Ministerie van Justitie en Veiligheid \(VI\) voor het jaar 2019 \(wijziging samenhangende met de Voorjaarsnota\)](#), 2019.

<sup>931</sup> EUR 33 million divided by: capacity 250 x turnover 2 asylum seekers per year x lifespan 30 years = EUR 2,200.

<sup>932</sup> The number of first-time applicants includes secondary movers. A better estimate of numbers of first-entry applicants would be the number of first-time applications minus the number secondary movers who apply for asylum (again) in the country they moved to. This number is not known but could be proxied with the number of Dublin take-back requests, which is about half the number of first-time applications according to Eurostat data. The number of

of the applicants in countries such as Greece and Italy move out the day after being admitted to an open reception centre. It seems reasonable to assume they move out to leave the country to a preferred other country. Of course, some may leave the country later, but on the other hand, some may be stopped at the border with other EU countries. Another indication is that the number of Dublin take-back requests is one-quarter of the total number of asylum applications. With secondary moves, asylum applications are made two or more times per secondary mover. Hence for every two asylum seekers, one Dublin take-back request is made, corresponding to 50% of the asylum seekers being secondary movers. Since the mandatory border procedure only applies to first entries, the closed reception centres would be required for only half of the asylum seekers in 'preferred destination' countries in the northwest of Europe. These countries currently have detention centres for secondary movers but rarely use close reception centres for first-entry applicants. For example, in the Netherlands, in 2018, about 2,500 persons caught without residence permits were detained on a total of 3,500 detentions of aliens (asylum applicants and people without residence permit).<sup>933</sup> Thus, only 1,000 asylum seekers were detained out of 20,000 first-time asylum applicants in the Netherlands in 2018. Thus, the capacity to detain first-time applicants is assumed to be absent in preferred destination countries. This results in total costs of EUR 46 to 71 million per year in the group of preferred destination countries, or equivalently annually EUR 0.23 to 0.35 per head of the population.

For countries along the Balkan route and countries less affected by migration flows, the cost of mandatory border procedures is limited (see table below).

Table E.2: Estimated cost of constructing and guarding closed reception centres for asylum seekers from countries from which less than 20 % of the applicants are recognized (per normal year)

		Total	FL	BR	PD	OC
A	Nr applicants from safe countries	232,045	99,905	5,550	116,215	10,375
B	Nr applicants in families with children <12	111,070	39,610	2,160	68,420	880
C = A-B	Nr applicants without children <12	120,975	60,295	3,390	47,795	9,495
D	Estimated % first entry	19 %	100 %	0 %	50 %	50 %
E = C x D	Needed capacity	44,470	30,148	0	11,949	2,374
F	Current capacity	28,000	28,000	0	0	0
G = E - F	Additional capacity needed	16,470	2,148	0	11,949	2,374
H1	Cost per applicant, guards + enclosing open centres	3,582	3,379	2,907	3,848	2,431
H2	Cost per applicant, guards + replacing open with closed centres	5,506	5,194	4,468	5,914	3,736
G = E x F	Total cost per year (x EUR mln.)	59-91	7-11	0	46-71	6-9
	Per inhabitant (EUR)	0.13-0.20	0.06-0.09	0.00-0.00	0.23-0.35	0.06-0.00

secondary movers could also be estimated from Eurodac data, however only 65% of the Dublin take-back transfers concerns a person with a hit in the Eurodac database. This means that the Eurodac database strongly underestimates the number of secondary movements. Another estimate of secondary movers could be the number of asylum seekers who disappear without a trace from reception centres (although they could also have moved to a secret place in the same country) but there is no registration of this. In short, there is no really good measure of secondary movers and an assumption is needed.

<sup>933</sup> [TK rapportage Vreemdelingenketen 2018](#) (report to the Parliament on aliens and asylum seekers).

Note: FL=Frontline, BR=Balkan Route, PD=Preferred Destination, OC=Other Countries. See footnote to earlier table.

Sources: Eurostat (nr applicants, first entry, population), national data (capacity), desk research (costs)

The requirement that asylum seekers from countries from which less than 20% of the applications are successful are denied entry to the EU also implies that they should have no opportunity to move to another EU Member State without a residence permit during the border procedure. It should be noted that the border procedure and the new broad EU definition of 'safe countries' do not affect the likelihood of asylum application rejections: the new EU definition implies that more than 80% of the application of those in a border procedure would also have been rejected without the border procedure. The border procedure and broader EU definition of 'safe' countries do not directly affect the rate of successful returns of rejected asylum seekers to their country of origin either.

If rejected asylum seekers are not successfully returned (they do not cooperate or the country of origin does not take them back), they cannot be detained indefinitely because the proposed new pact has no provisions for this situation and indefinite detention goes against human rights principles. According to 2016 data, only a small minority of those ordered to return were actually detained, and most detentions were in the UK.<sup>934</sup> The higher retention rates in the UK and the higher rates of successful return from that country may suggest a causal link. However, the new pact does not provide rules for the situation that someone ordered to return does not actually return. Therefore, it is assumed that based on human rights principles and recent empirical data, rejected asylum seekers who could not be returned are not detained much longer and thus have an opportunity to move to another country.

According to Eurostat data, at EU level, 34% of the asylum seekers who were ordered to return in 2019, actually, return to their country of origin, and 30% of those ordered to return by frontline Member States (Greece, Italy and Spain).<sup>935</sup> For the other 70%, it is assumed that at the end of the deadline of the fast-track border procedure, they would not be detained much longer, based on the legal and empirical arguments mentioned above. Of those, the assumption is that half of them will make a secondary move to another EU Member State, as we estimate is currently the case.

Based on Swedish annual migration data, we can estimate that the cost of a Dublin request is EUR 800 per request.<sup>936</sup> According to Eurostat data, about 10% of the outgoing Dublin take-back requests results in a transfer to the responsible country. Reasons include that the asylum seeker does not co-operate and absconds, that they (successfully) appeal and that transfers are prohibited due to inadequate accommodation standards.<sup>937</sup> In addition, for those secondary movers who are not stopped at the border, costs in detaining secondary movers are saved in the country of preferred destination. Based on available Dutch data,<sup>938</sup> 50% of the secondary movers are stopped at the border, and thus detention costs for the duration of a Dublin take-back request are saved. Although the duration of a Dublin take-back request can last up to 6 months, the average duration is 13 weeks. We can assume that, thanks to the biometric data that will be made available in the Eurodac database and which will allow the efficient identification of the responsible country, the duration of

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<sup>934</sup> Fasani et al., [Lift the Ban? Initial Employment Restrictions and Refugee Labour Market Outcomes](#), IZA Discussion Paper No. 13149, 2020.

<sup>935</sup> The number of successful returns was about half that in earlier years. This may have been caused by Covid-19 travel restrictions, as mentioned in an interview with Swedish authorities. It should also be noted that higher rates of returns reported in earlier reports include the United Kingdom, which successfully returned large numbers of rejected asylum seekers to their countries of origin.

<sup>936</sup> [Migrationsverket](#).

<sup>937</sup> European Court of Human Rights decision in 2011 to ban returns to Greece: *M.S.S. v. Belgium and Greece* (application no. 30696/09).

<sup>938</sup> See the previously cited TK report.

a Dublin take-back request will be reduced to 4 weeks. Based on our calculations, the costs of a Dublin transfer are assumed to amount to EUR 500 for a flight ticket plus EUR 91 to escort the asylum seeker to the plane. Thus, the saved costs for preferred destination countries is per asylum seeker in frontline countries:

Table E.3: Estimated cost savings per asylum seeker in preferred destination countries by a reduced number of Dublin take-back procedures

	A Cost per applicant in PD countries	B % secondary movers not caught at the border	C % of Dublin take-back requests that results in a transfer	D = AxBxC Savings per applicant by proposed measures
Cost of outgoing Dublin take-back request	800			800
Cost of detaining secondary movers (4 weeks)	5,914 - 1,820 = 4,095	50 %		2,048
Cost of Dublin transfers	591		10 %	59
Total				2,907

Source: desk research

For frontline Member States, this will save an estimated EUR 500 per incoming Dublin take-back requests for 30 % of the asylum seekers from countries from which less than 20 % of the applicants are recognized, and of which half is estimated to move to another EU country without a residence permit. The benefits amount to EUR 3.1 million per year for the frontline Member States combined and EUR 18.2 million per year for the preferred destination countries combined. The associated benefits are presented in the table below.

Table E.4: Estimated benefits of a reduced number of Dublin take-back procedures due to the no-entry provision (per average)

		Total	FL	BR	PD	OC
A1	Nr persons entering mandatory border procedure		60,295			
A2	Rejection rate		70 %			
B	% successful returns		30 %			
C	% secondary movers (assumed)		50 %			
D = A1 x A2 x B x C	Reduced number of secondary movers	6,257	6,257			
D	Cost per secondary mover		500		2,907	
E = C - D	Cost savings by reduced number of secondary movers (EUR mln.)	21	3.1	0.0	18.2	0.0
F	Per inhabitant	0.05	0.03	0.00	0.09	0.00

FL, BR, PD, OC: Frontline, Balkan Route, Preferred Destination and Other Countries. See footnote to earlier table.

Sources: Eurostat (nr applicants, returns), desk research (costs)

Another proposed measure with economic effects is the limitation of the duration of the asylum border and return border procedure to 12 weeks each for asylum seekers from countries from which

less than 20 % of successful applications, including appeals. In the current situation, the asylum and return procedures combined take a year in the western EU Member States (and less in the eastern EU Member States due to secondary movements, which the economic analysis takes account of separately) due to appeals, which affects both the current regular and accelerated procedures. This is to be partly achieved by reducing the rights to make different appeals; partly by the requirement to decide on asylum and return at the same time; and partly by the requirement that the same courts handle both the first instance and the appeal. The limited duration saves reception costs for those asylum seekers who are successfully returned to the country of origin. As noted earlier, the mandatory border procedure does not affect the rate of returns itself. The limited duration has negative impacts on human rights, as discussed in Section 6.5.1.

The reduced deadlines of the border procedure result in lower costs of reception of those who are successfully returned to their country of origin. For the others, reception costs continue after the expiration of the deadline of the mandatory border procedure, with the exception that, for further reception, asylum seekers may be moved from closed to open reception centres, which is assumed to happen, confirm current practice (see also Section 6.2.2.). Savings on appeal costs are realised for all asylum seekers (not only those successfully returned to their country of origin). The economic benefits consist of an annual EUR 543 million savings on reception and procedure costs combined, mostly realised in the Member States with an EU external border and preferred destination countries.

Table E.5: Estimated benefits of reduced deadlines of border procedures and more efficient appeal procedures (per normal year)

		Total	FL	BR	PD	OC
A	Successful return %	25 %	14 %	27 %	23 %	73 %
B	% First entry	70 %	100 %	0 %	50 %	50 %
C1	Nr applicants entering mandatory border procedure	120,975	60,295	3,390	47,795	9,495
C2	Rejection rate	81 %	70 %	93 %	93 %	38 %
D	Reception savings per applicant from safe countries	4,705	5,202	4,474	5,923	3,742
$E = A \times B \times C1 \times C2 \times D$	First sub-total reception savings (EUR mln.)	108	65	0	40	3
F1	Nr applicants not entering mandatory border procedure	578,120	178,580	17,365	362,335	19,830
F2	Rejection rate	41 %	34 %	32 %	45 %	68 %
G	Reception savings per applicant from non-safe countries	4,463	5,202	4,474	5,923	3,742
$H = A \times B \times F1 \times F2 \times G$	Second sub-total reception savings (EUR mln.)	251	92	0	149	10
I	50 % savings on appeal process costs	300	300	300	300	300
$J = B \times (C+F) \times I$	Sub-total process cost savings (EUR mln.)	138	72	0	62	4
$K = E + G + J$	Total cost savings	497	229	0	251	18

	Per inhabitant	1.11	1.95	0.00	1.24	0.18
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FL, BR, PD, OC: Frontline, Balkan Route, Preferred Destination and Other Countries. See footnote to earlier table.

Sources: Eurostat (nr applicants, first entry), desk research (costs)

A third change in the proposed measures with substantial economic impacts is the requirement for adequate accommodation. This may require upgrading existing accommodation. However, the proposed measures do not clearly specify what is meant with 'adequate accommodation', so assumptions are needed for an assessment of the economic impact. In 2011, the ECtHR banned transfers of asylum seekers to Greece because of inadequate accommodation.<sup>939</sup> This is a reason to assume that in Greece, all accommodations would have to be upgraded. A report of the European Fundamental Rights Agency<sup>940</sup> indicates that in Hungary, asylum seekers are automatically placed in transit zones 'with limited access to reception conditions'. It also reports that 'hotspots' where asylum seekers are screened and 'pre-reception' facilities in Belgium and France are generally inadequate and that emergency shelters are not always adequate, including, for example, in Germany. Emergency accommodations normally concern only a minority of asylum seekers. Sweden is mentioned as a country with generally adequate housing. Based on these assessments, the following assumptions are made:

- In Greece and Hungary all facilities are inadequate;
- In Sweden, all facilities are adequate;
- In other countries, reception facilities for 10 % of the asylum seekers are inadequate.

These estimated numbers of asylum seekers for which reception centres are inadequate are conservative. However, as noted, the new pact provides no definition of 'adequate' accommodation and the construction of adequate accommodation, while according to Eurostat SILC data, 4.0 % of the residents face 'severe housing deprivation'<sup>941</sup> is politically sensitive which gives cause for a conservative estimate.

There is no specific information about what will be considered 'adequate' accommodation standards. If reception centres are built modular and only more space is needed, existing centres could be adjusted. Based on data from France in an EMN ad hoc query from 2017,<sup>942</sup> it is estimated that, in France, the difference in cost between adequate and substandard accommodation is EUR 3,000 per asylum seeker per year or 50 % of the cost of inadequate accommodation. Assuming two asylum seekers per year can use the same capacity slot, the cost per asylum seeker would be EUR 1,500.

However, if spaces are confined between stone walls or windows leave through too little light, building a new centre and demolishing the old one may be cheaper. One reason to assume that most open reception centres that are inadequate cannot be adjusted is that they are sometimes old buildings that would have been demolished already if they had not been destined for asylum seekers.<sup>943</sup> In this pessimistic scenario building, a new reception centre would cost EUR 2,200 per asylum seeker. At EU level, the cost of this measure would be between EUR 150 and 225 million per

<sup>939</sup> European Court of Human Rights decision in 2011 to ban returns to Greece: *M.S.S. v. Belgium and Greece* (application no. 30696/09).

<sup>940</sup> European Union Agency for Fundamental Rights (2016), [Fundamental Rights Report 2016](#).

<sup>941</sup> Eurostat, housing deprivation data, Eurostat code ILC\_MDHO06A.

<sup>942</sup> EMN, [Ad hoc query on Average cost and average length of reception for asylum seekers](#), 2017.

<sup>943</sup> See for example: RTV Oost, [Voormalig azc Azelo wordt gesloopt](#), 2021.

year, of which between EUR 100 and 150 million per year for frontline Member States and between 50 and 75 million per year for preferred destination countries.

Table E.6 Estimated costs of upgrading existing reception facilities to meet minimum accommodation requirements (per normal year)

		Total	FL	BR	PD	OC
Nr asylum seekers (2019)		699,095	238,875	20,755	410,130	29,325
Required capacity (2 persons per capacity slot per year in border procedures, 1 per year in regular asylum/return procedures)		622,590	208,728	17,365	374,284	22,204
A	Assumed nr asylum seekers in inadequate reception facilities	114,441	74,773	2,187	35,262	2,220
B1	Cost per asylum seeker to upgrade facilities (in EUR)	1,363	1,317	1,133	1,500	948
B2	Cost per asylum seeker to replace facilities (in EUR)	1,999	1,932	1,662	2200	1,390
C = A x B	Total cost to ensure adequate reception centres (mln. EUR)	156-229	98-144	2-4	53-78	2-3
	Per inhabitant (in EUR)	0.35-0.51	0.84-1.23	0.08-0.11	0.26-0.38	0.02-0.03

FL, BR, PD, OC: Frontline, Balkan Route, Preferred Destination and Other Countries. See footnote to earlier table.

Sources: EMN ad hoc query on costs (2017)

If accommodation in Greece meets minimum standards, other Member States may request Greece to take back asylum seekers if Greece was the country of first entry. German authorities mentioned this in an interview. The EU Court of Human Rights banned Dublin take-back transfers to Greece in 2011 due to inadequate accommodation standards.<sup>944</sup> According to Eurostat data, the number of Dublin take-back transfers to Greece was negligible.

According to Eurostat data, the potential number of Dublin take back requests to Greece is estimated to be 16,500 based on the share of Greece in the total number of first asylum requests in the EU. The potential number of Dublin transfers to Greece is estimated to be 1,650, since according to Eurostat, about 10% of the requests results in a transfer. This, on the one hand, involves some minor costs of processing and the actual transfer for preferred destination countries and, on the other, a substantial shift of lifetime costs per migrant from preferred destination countries to Greece. These lifetime costs are estimated at over EUR 200,000 per asylum seeker. However, they only apply to asylum seekers who are not successfully returned to their country of origin. In addition, it is assumed that 75% of those taken back by Greece will successfully attempt a second or third secondary movement to a preferred destination country. This results in reduced lifetime costs of EUR 26 million per year for preferred destination countries and increased lifetime costs of EUR 23 million per year for Greece. If we include processing costs, Greece's overall annual costs are higher (EUR 31 million), and the benefits are lower for preferred destination countries (EUR 12 million, see table below).

<sup>944</sup> See ECHR, [Press release: Belgian authorities should not have expelled asylum seeker to Greece](#), 2011.

Table E.7 Estimated change in costs due to Dublin transfers to Greece if accommodation becomes adequate in Greece (per normal year)

		Total	FL	BR	PD	OC
A	Potential nr Dublin take-back requests to Greece				16,500	
B	Cost per Dublin take-back request		500		800	
$C = A \times B$	Total processing costs (in EUR mln)	21.5	8.3		13.2	
$D = A * 10\%$	Potential nr Dublin take-back transfers to Greece				1,650	
E	Cost per Dublin take-back transfer				591	
$F = D \times E$	Total transfer costs (in EUR mln)	1.0			1.0	
G	Costs of lifetime stay per asylum seeker		222,188		-253,000	
H	% unsuccessful returns		70 %		69 %	
I	Estimated % that will not try another secondary movement		25 %			
$J = F \times G \times H \times I$	Change in costs of lifetime stay (in EUR mln)	-2.8	23.1		-25.9	
$K = C + F + J$	Total change in costs (in EUR mln)	19.6	31.4		-11.8	
	Per inhabitant (in EUR)	0.04	0.27		-0.06	

FL, BR, PD, OC: Frontline, Balkan Route, Preferred Destination and Other Countries. See footnote to earlier table.

Sources: Eurostat (Dublin requests, transfers, returns), desk research (costs)

The minimum accommodation requirements also apply to temporary shelters during a time of migratory pressure. However, in times of crisis, compulsory solidarity conditions apply as well. Therefore, the costs of temporary shelters (meeting minimum accommodation requirements) are estimated in the next section for the responsibility sharing and solidarity mechanisms.

The collection of biometric data requires IT investments that are estimated at EUR 15 million per country, regardless of the number of asylum seekers based on data from the Swedish yearbook and Dutch government budget accounts,<sup>945</sup> as argued below. In the Netherlands and Sweden, the total IT costs vary between EUR 5 million and EUR 15 million per year. The development of an IT system usually takes multiple years. However, most of the current annual IT costs concern resettlement (where people from unsafe countries are flown in and resettled in the EU) and integration of asylum seekers.<sup>946</sup> This is a reason to assume that the costs of developing IT systems to collect biometric data is lower than average. The costs of IT systems to facilitate these activities are namely high because many actors are involved, which is generally known to increase the cost of IT. However, the

<sup>945</sup> Rijksoverheid, [VI Justice and Security National Budget 2019](#).

<sup>946</sup> [Swedish yearbooks of Migrationsverket](#).

Eurodac system involves fewer actors and types of actors, i.e., in principle, only the migration services of the EU Member States. Therefore, the costs of IT investments to support biometric data is estimated at three years of low annual costs (3 x 5 million = 15 million) because government IT systems usually take a few years to complete. The IT system is assumed to last 10 years, which seems a reasonable time horizon for IT investments. The estimated cost of equipment to collect biometric data is relatively small: EUR 20 per asylum seeker. Calculations are made based on the assumption that no additional staff is needed to enter the biometric data in the IT system. The cost of a lifetime stay per migrant (admitted or failed to be returned) is estimated at about EUR 200,000 using data from Van de Beek et al. (2021)<sup>947</sup> on costs of a lifetime stay in the Netherlands (net benefit EUR 125,000 if employed and net cost EUR 475,000 if not employed), and an employment rate of 37 % assumed by Ballegooi and Navarra (2018).<sup>948</sup>

The requirement that biometric data are collected during the pre-entry screening and the connection with EU-level databases is a substantial investment and is expected to result in easier identification of the responsible country, and thus in additional Dublin take-back transfers. The number of Dublin take-charge requests, mainly for family members of already admitted asylum seekers, is assumed to remain unaffected because families currently already state clearly where the member they seek to join lives. A Dublin take-back request can be issued after a Eurodac hit or if a strong suspicion exists of which country is responsible for the asylum seeker. Incoming Dublin take-back requests are more likely to be accepted after a direct Eurodac hit because a direct Eurodac hit is evidential, while a strong suspicion is not. Currently, 65 % of Dublin take-back requests are made after a direct Eurodac hit.<sup>949</sup> For the impact assessment, it is assumed that this percentage will increase to 100 % after biometric data are collected. While the number of Dublin take-back requests thus remains the same, the number of Dublin take-back transfers is estimated to increase by 50 %.

Table E.8 Estimated change in costs due to collection of biometric data (per normal year)

		Total	FL	BR	PD	OC
A	Current nr Dublin take back requests	15,251	216	1,152	13,752	131
B	Change in cost per take back request	-293	-263	-227	-300	-190
C = A x B	Total change in costs of take back requests (in EUR mln)	-4.5	-0.1	-0.3	-4.1	0.0
D	Total cost of IT investments (in EUR mln)	40.5	4.5	7.5	13.5	15
E	Nr asylum seekers	699,095	238,875	20,755	410,130	29,325
F	Cost of biometric equipment per asylum seeker	20	20	20	20	20

<sup>947</sup> Van de Beek, J., H. Roodenburg, J. Hartog and G. Kreffer, [Grenzeloze verzorgingsstaat](#) (Borderless Care Nation), 2021. It is the average of about 450,000 costs for 80% depending on welfare and about 125,000 benefits. The assumed lifetime employment rate of 37% is much higher than the about 20% employment rate of recent migrants from outside Europe from the Austrian Integrationsbericht (Expertenrat fuer Integration, [Integrationsbericht](#) 2018). However, it is assumed that the employment rate increases over time. The costs include public expenditures (on Defence, public administration, education, healthcare and culture) per capita.

<sup>948</sup> Ballegooi, W. and C. Navarra, [The Cost of Non-Europe in Asylum Policy](#), EPRS report, 2018.

<sup>949</sup> Fratzke, S. 'Not Adding Up – The Fading Promise of Europe's Dublin System – EU Asylum: Towards 2020 Project', Migration Policy Institute Europe, March 2015.

$G = E \times F$	Total cost of biometric equipment (in EUR mln)	14.0	4.8	0.4	8.2	0.6
H	Estimated increase in take-back transfers	1,504	0	115	1,375	13
I	Lifetime costs of a stay in the EU per migrants		222,188	-191,119	-253,000	-159,836
J	% unsuccessful returns		70 %	73 %	69 %	58 %
K	Assumed % that will not try another secondary movement		25 %			
$L = H \times I \times J \times K$	Change in costs of lifetime stay (in EUR mln)	-5.8	58.9	-4.0	-60.3	-0.3
$M = C + D + G + L$	Total change in costs (in EUR mln)	44.2	68.1	3.6	-42.8	15.3
	Per inhabitant	0.10	0.58	0.11	-0.21	0.16

FL, BR, PD, OC: Frontline, Balkan Route, Preferred Destination and Other Countries. See footnote to the earlier table.

Sources: Eurostat (Dublin requests, transfers), desk research (costs).

The proposed measures also require the preparation by national authorities of a debriefing form to be addressed to the competent national authorities in charge of the asylum or the return procedures. The cost of compiling data for such a form is costly because information is required about the migration route and the people who arranged the travels. Additional staff (interpreters) is required to collect data in non-native languages. Assuming that one interpreter can compile debriefing note data for on average 200 asylum seekers per year, the cost per asylum seeker would be EUR 195. This might seem a low cost per asylum seeker, but especially in Greece, Italy, and Spain, asylum seekers come in groups, and thus much of the data would be similar for all asylum seekers in that group.

Table E.9 Estimated costs (and unknown benefits) of the debriefing form (per normal year)

		Total	FL	BR	PD	OC
A	Nr asylum seekers	699,095	238,875	20,755	410,130	29,325
B	Cost of debriefing form per asylum seeker	182.5	171	147	195	123
$C = A \times B$	Total costs debriefing form (in EUR mln)	127.6	40.9	3.1	80.0	3.6
	Per head of the population	0.3	0.3	0.1	0.4	0.0
	Benefits of more effective deployment of Frontex staff if the form is shared with them	Unknown	Unknown	Unknown	Unknown	Unknown

FL, BR, PD, OC: Frontline, Balkan Route, Preferred Destination and Other Countries. See footnote to earlier table.

Sources: Eurostat (nr asylum seekers), estimate (costs).

## E.2 Sharing and solidarity measures

Key findings:

- The removal of the 18-month deadline for Dublin take-back transfers shifts about EUR 50 million per year from preferred destination countries to countries of first entry;
- Return sponsorship is financially the most attractive for Member States other than the frontline Member States
- A compensation of EUR 10,000 per asylum seeker for relocation does not cover the cost of even one year of relocation and does not incentivize voluntary solidarity;
- Keeping asylum seekers outside the EU while their application is processed would save enormous amounts, but it is uncertain whether increased coordination of contacts with third countries would achieve that.

Our analysis of the economic impacts of the mechanisms for responsibility sharing and solidarity reflects in particular return sponsorship and relocation operations, including their application in times of crisis. Most solidarity measures in the new pact have economic effects in crisis years only because the incentive of EUR 10,000 per asylum seeker is assessed to be financially insufficient for voluntary solidarity.

With regard to the Dublin procedures, the new pact does not change much with substantial economic impacts. Most economic impacts of the new pact with regard to the Dublin procedures are achieved by changes in the pre-screening procedures, such as the mandatory border procedure (which reduces the likelihood of secondary moves due to increased detention and thus the number of Dublin take-back requests), the collection of biometric data (which increases the likelihood of determining the responsible country according to Dublin rules) and adequate reception conditions (which would lead to lifting the ban on Dublin take-back transfers to Greece). These changes have been discussed above under the pre-screening measures.

One measure that directly affects Dublin procedures and has substantial economic impacts is the removal of the **18-month deadline** for Dublin take-back transfers for absconding asylum seekers. This will likely result in an increasing number of transfers. The reason is that if a secondary mover is ordered to move back to the country of first entry and transfer does not take place within 3 months, and up to 18 months if the asylum seeker absconds, the responsibility for the asylum seeker shifts to the country to which the asylum seeker has moved. Thus, the removal of this deadline shifts costs from preferred destination countries to frontline Member States. However, the number of secondary movements is unknown. A lower bound estimate assumes that the number of transfers that fail after 18 months is the same as the number of transfers that take place between 13 and 18 months. A reason for this assumption is that the number of transfers declines rapidly with the duration after the Dublin take-back request goes out, suggesting that the likelihood of finding absconding asylum seekers declines rapidly over time. Under this assumption, removing the 18-month deadline for Dublin take-back transfers shifts costs of about EUR 85 million per year from preferred destination countries to frontline Member States.

The other measures affecting sharing and solidarity apply in special circumstances such as a year of migratory pressure or a refugee crisis year. In a situation of migratory pressure, countries have three options to comply with solidarity requirements: **capacity building**, **relocation** and **return sponsorship**. The new pact includes a mass correction mechanism to ensure a minimum number of relocations or return sponsorships if too many countries would opt for capacity building. However, to compare the cost of the options, the hypothetical assumption is made that all countries choose 100% for only one of the three options.

We assume that migratory pressure is caused every five years with additional applicants arriving at frontline Member States and preferred destination countries (and none at countries less affected by migration flows). If Member States opt for **capacity building** of reception facilities every time, this option would financially be most attractive for the frontline Member States but not for the other Member States. **Return sponsorship** and capacity building are financially similarly attractive for preferred destination countries. For countries less affected by migration flows, **relocation** and return sponsorship are financially similarly attractive. Thus the option that is financially most attractive for all Member States other than the frontline Member States is return sponsorship.

Table E.10: estimated total costs and benefits of proposed measures regarding solidarity (in EUR mln., per normal year (18-month deadline removal) and in specific years (other measures))

		Total	FL	BR	PD	OC
A	18-month deadline removal of Dublin take-back transfers (in EUR mln.), per normal year	-4.9	49.9	-1.2	-53.6	0.0
B	Compulsory solidarity, capacity building option (years of pressure, annualised per calendar year)	2,479	-2,458	835	1,737	2,365
C	Compulsory solidarity, relocation option (crisis years, annualised per calendar year)	3,271	-1,332	693	2,499	1,412
D	Compulsory solidarity, return sponsorship option (crisis years, annualised per calendar year)	2,759	-1,071	645	1,870	1,314
E	Voluntary solidarity (assumed not to take place due to insufficient compensation)	0	0	0	0	0
F	Increased coordination at EU level with third countries	Unknown	Unknown	Unknown	Unknown	Unknown
G = A+D	Cost-benefit difference (return sponsorship in crisis years)	2,754	-1,021	644	1,816	1,314

FL, BR, PD, OC: Frontline, Balkan Route, Preferred Destination and Other Countries. See footnote to earlier tables.

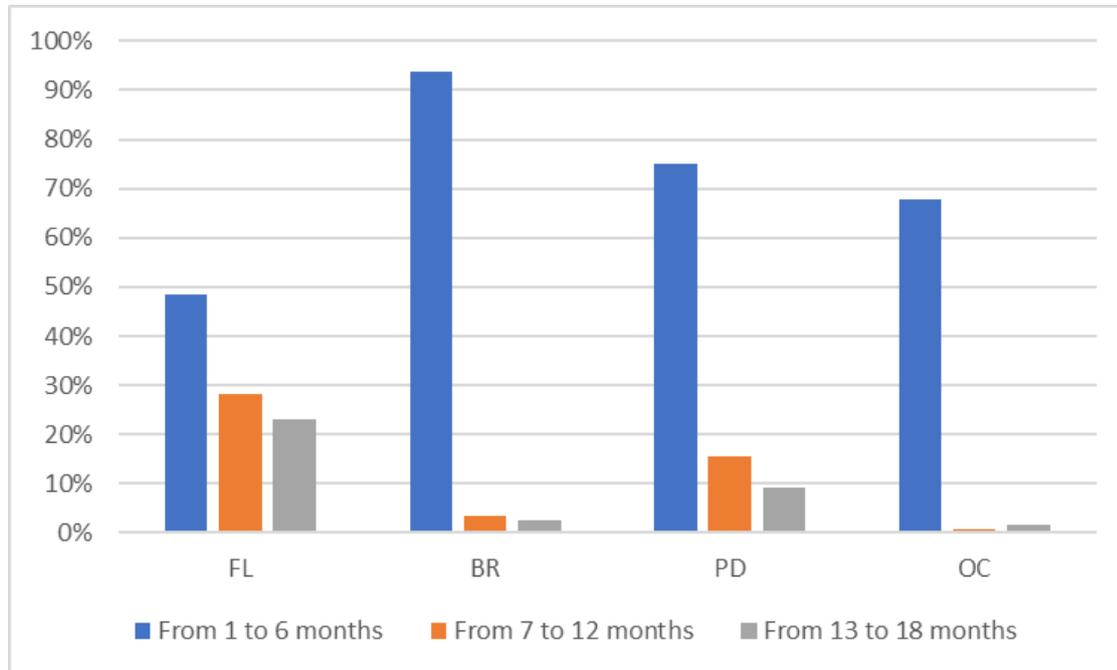
With regard to the removal of the 18-month deadline for Dublin take-back transfers of absconding asylum seekers, similar further assumptions are made as in the previous section on pre-screening procedures:

- 25 % of those taken back will not attempt another secondary movement;
- Asylum seekers who make a secondary movement are likely ordered to return to their country of origin;
- On average 25 % of rejected applicants actually return;
- The cost of Dublin transfers is EUR 591 per asylum seeker;
- The lifetime cost of stay varies between EUR 160,000 per asylum seeker who could not be returned to the country of origin for 'other countries' that are little affected by migrant flows to EUR 253,000 for preferred destination countries in the northwest of Europe.

The main economic impact of the removal of the 18-month deadline and the resulting increase in Dublin take-back transfers is that lifetime costs of a stay in the EU shift from preferred destination countries to frontline Member States. The removal of the deadline for absconding asylum seekers

does not affect the rate at which asylum seekers abscond, nor the likelihood of sending an outgoing Dublin take-back request or the likelihood that another country accepts the incoming Dublin take-back request. About 90 % of the outgoing Dublin take-back requests are made by preferred destination countries, and 8 % by countries along the Balkan route. For these countries, the likelihood of a Dublin transfer declines rapidly with the duration since the outgoing request is made (Figure E.1).

Figure E.1: Duration since the outgoing Dublin take-back request within which a successful transfer takes place (2019 data)



Source: Eurostat.

We assume that the number of Dublin take-back transfers that failed despite having found the absconding asylum seeker because the 18-month deadline has expired is the same as the number of Dublin transfers that take place between 12 and 17 months after the Dublin take-back request went out. The reason is that Eurostat data show that about 75 % of the transfers take place within 6 months, suggesting that the likelihood of finding an absconding asylum seeker rapidly declines over time. Under this assumption, the removal of the 18-month deadline for Dublin take-back transfers shifts costs of about EUR 50 million per year from preferred destination countries to frontline Member States (Table E.11). Of course, the collection of biometric data during the screening procedure may increase the likelihood of identifying absconding asylum seekers, but the impact of collecting biometric data has been assessed above already.

Table E.11: Estimated change in costs due to the removal of the 18-month deadline for Dublin transfers (per normal year)

		Total	FL	BR	PD	OC
A	Current nr Dublin take-back transfers	15,251	216	1,152	13,752	131
B	% outgoing take-back transfers with duration 13-18 months	9 %	23 %	3 %	9 %	2 %

C = A x B	Assumed additional number outgoing Dublin take-back transfers	1,373	50	35	1,238	3
D	Cost of assumed additional Dublin take-back transfers (in EUR mln.)	0.8	0.0	0.0	0.7	0.0
E	Change in costs of lifetime stay in country (in EUR mln.)	-5.6	49.9	-1.2	-54.3	0.0
F = D + E	Change in costs of 18-month deadline removal (in EUR mln.)	-4.9	49.9	-1.2	-53.6	0.0
	Per inhabitant	-0.01	0.42	-0.04	-0.27	0.00

FL, BR, PD, OC: Frontline, Balkan Route, Preferred Destination and Other Countries. See footnote to earlier table.

One of the solidarity proposals is that countries receive EUR 10,000 per asylum seeker for relocations. However, the cost of accommodation (refurbishment), cost of living and healthcare combined already cost EUR 11,000 per year in preferred destination countries. Staff costs and costs to build reception capacity need to be added to this. Thus, voluntary solidarity in the form of relocation is financially not attractive if the asylum seeker cannot be returned within one year. Based on data from the previously cited EMN Ad hoc query of 2017<sup>950</sup>, the costs per asylum seeker per year are estimated at EUR 22,000 in a preferred destination country in the northwest of Europe. The cost would be less in other countries with lower purchasing power, but not enough to make the EUR 10,000 compensation per relocation financially attractive. The attractiveness of the compensation is reduced if we consider that all Member States contribute to the fund out of which the EUR 10,000 compensation is paid.

As already discussed, significant changes in the new proposals which affect solidarity are the proposed measures in case of crisis. Eurostat data show that in 2015, the number of asylum applicants was twice as high as in 2019: about 1.2 million compared to 600 thousand. About 400 thousand asylum applicants in 2015 came from Syria, and 98% of their applications were approved. The future crisis scenario assumes an additional 600 thousand asylum seekers in one year from a country where war has just broken out in a country that was safe before the war. After the war ends, the country is assumed safe again, so war refugees would be ordered to return to their country of origin.

The scenario assumes that the Commission would evoke the immediate protection status. It is noted that the proposed measures grant this competence to the Commission, which is a significant change compared to the current Temporary Protection Directive (Article 4(2)), where a two-thirds majority of the Council must approve the possibility to grant asylum seekers a temporary protection status (see Chapter 5). If the Commission would not evoke the immediate protection status in the crisis scenario described above, war refugees would be subject to the border procedure (with no-entry conditions) because the pre-war statistics still indicate that less than 20% of the applications of asylum seekers from that country are rejected. However, no capacity in the EU exists to detain (or otherwise restrict the movement of) 600 thousand additional asylum seekers, and the asylum system would collapse. The immediate protection status suspends the asylum procedure for up to one year and grants those under immediate protection access to the EU, after which they must enter the regular asylum procedure. A practical implication is that the war refugees may be held in open reception centres instead of closed reception centres.

<sup>950</sup> EMN (2017), ['EMN Ad Hoc Query on Average cost and length of reception for asylum seekers'](#).

Another change that will take place in the main scenario is that the solidarity mechanism is assumed to be triggered, in which compulsory solidarity for the war refugees is allocated to all Member States, with 50 % based on their population and 50 % on their GDP (the 'solidarity key'). In the refugee crisis of 2015 and later, about 70 % of Syrians applied for asylum in Germany alone, according to Eurostat data. For simplicity, the future scenario assumes that 50 % of the war refugees apply for asylum in frontline Member States (Greece, Italy and Spain), and 50 % of them applies for asylum in preferred destination countries in the northwest of Europe.

The solidarity key allocates most responsibility to the preferred destination countries (53 % of the war refugees) and to a lesser extent to the frontline Member States (24 %). The high solidarity share of the group of frontline Member States is not surprising given that both Italy and Spain are large countries. According to Eurostat data on population and GDP, the solidarity key makes a group of countries along the Balkan route jointly responsible for 6 % of the war refugees and the other countries for 17 % combined.

It is difficult to predict the likelihood of refugee crises or migratory pressure. In recent years, the most significant crises that affected the EU were the war in Syria (from 2011, peak in 2015-2016) and the Yugoslav wars (1991-2001). In the economic impact assessment, it is assumed that a situation arises with abnormally high numbers of refugees from clearly unsafe countries every five years. In a situation of migratory pressure, countries have three options to comply with compulsory solidarity:

1. Building reception capacity in other countries (in certain cases);
2. Immediately accepting refugees from other countries;
3. Sponsoring returns of refugees in other countries.

In the first option, countries build capacity for the excess numbers of refugees during every year of migratory pressure. The assumption is that even though a reception facility is operational for a much longer period (30 years) than the average time between two years of migratory pressure (5 years), countries cannot use the argument that they already built capacity during a previous year of pressure, or during a previous year of an ongoing situation of pressure. Thus, a reception centre built in one's own country can be used for in total six crises in 30 years, but to show solidarity by building capacity in another country, a new reception centre needs to be built every year of migratory pressure. The cost of a reception facility in the Netherlands costs EUR 33 million for 250 asylum seekers or EUR 22,000 per asylum seeker in a crisis year.<sup>951</sup> Corresponding costs in Greece, Italy or Spain are estimated at EUR 19,321 (correcting for differences in purchasing power parity). However, suppose another country builds capacity in one of these three frontline Member States. In that case, the costs are EUR 115,924 per asylum seeker because the other country cannot present having built this centre earlier in a subsequent year of migratory pressure as justification not to support with capacity building again.

In the economic impact assessment scenario, this mechanism implies that other countries build capacity in frontline Member States that the latter countries can also use for the normal flow of asylum seekers. The cost of EUR 6 billion of frontline Member States to build capacity to receive refugees is more than compensated by the EUR 18 billion of other countries providing capacity-building support to frontline Member States, resulting in net savings for these Member States of EUR 12 billion (row G in Table E.12). However, construction costs are still small compared to the costs of a lifetime stay of rejected asylum seekers who could not be returned to their country of origin. For 300,000 refugees, these costs amount to EUR 23 billion in a crisis year in the group of frontline

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<sup>951</sup> EUR 33 million divided by 250 asylum seekers, and further divided by the six crisis years in which it can be used during its lifespan of 30 years.

Member States combined and to EUR 79 billion in a crisis year in the group of preferred destination countries combined (row M in Table E.12). However, the capacity building option does not change the number of asylum seekers staying lifelong in any country. Thus, the solidarity benefits the frontline Member States by about EUR 12 billion in a crisis year (EUR 2.5 after annualizing per calendar year). It costs the Balkan route countries, the preferred destination countries and other EU Member States EUR 0.8, 1.7 and 2.4 billion respectively after annualizing per calendar year.

To place these numbers in perspective: these costs are assumed to have occurred only once every five years. Averaged per calendar year (divided by 5), these costs are equivalent to EUR 2.4 billion in the group of frontline countries and EUR 18 billion in the group of preferred destination countries. Per head of the population, the costs vary from about EUR 20 per calendar year to about EUR 90 per calendar year in preferred destination countries (Table E.12).

Table E.12: Estimated change in costs due to compulsory solidarity, capacity building option (years of migratory pressure, annualised per calendar year)

		Total	FL	BR	PD	OC
A	Assumed number of refugees	600,000	300,000	0	300,000	0
B	Solidarity key	100 %	24 %	6 %	53 %	17 %
C	Allocated number of war refugees	600,000	144,000	36,000	318,000	102,000
D	Cost of building capacity per asylum seeker in own country		19,321		22,000	
E	Cost of building capacity per asylum seeker in frontline Member States			115,924	115,924	115,924
F = (C-A) x E	Total cost of building capacity in other countries in year of pressure (in EUR mln.)			4,173	2,087	11,824
G = A x D	Total cost of building capacity in own country, year of pressure (in EUR mln.)	-5,688	-12,288	0	6,600	0
H	% not returned to their country		70 %	73 %	69 %	58 %
I	% assumed to make a secondary move to a PD country		50 %	50 %		50 %
J = A x G x H	Number of war refugees staying lifelong	419,585	105,734	0	313,851	0
K	Number of war refugees staying lifelong without solidarity	419,585	105,734	0	313,851	0
L = J - K	Change in number of refugees staying lifelong	0	0	0	0	0
M	Costs of lifetime stay of additional asylum seekers from year of pressure and not returned (in EUR mln.)	102,897	23,493	0	79,404	0
N	Change in costs of lifetime stay of asylum seekers from year of pressure and not returned due to compulsory solidarity (in EUR mln.)	0	0	0	0	0
O = F + G + N	Change in cost of option 1 (building capacity) in year of pressure (in EUR mln.)	12,396	-12,288	4,173	8,687	11,824
P = O / 5	Total cost of option 1 (building capacity) per calendar year (in EUR mln.)	2,479	-2,458	835	1,737	2,365
	Per inhabitant	5.54	-20.91	26.29	8.61	24.63

FL, BR, PD, OC: Frontline, Balkan Route, Preferred Destination and Other Countries. See footnote to earlier table.

In the second option of relocation, which in our scenario takes place in a crisis year, refugees are relocated to other countries on the basis of population and GDP. It is another strong form of solidarity because relocation fully shifts the responsibility for the asylum seeker to the country of relocation. It is assumed that the countries where the war refugees arrive pay for the travel to the countries of relocation. Each country builds reception capacity for the relocated war refugees. During the crisis year, assuming in our scenario that the asylum procedure is suspended for all war refugees, none is returned to their country of origin during the year of suspension. They might still make (illegal) secondary movements to preferred destination countries during that year, but for simplicity purposes, this is not taken into account in the calculations. Some war refugees will be successfully returned after the normal asylum procedure, and others will make a secondary movement (illegally or legally after 3 years) to a country of preferred destination.

Table E.13: Estimated change in costs due to compulsory solidarity, relocation option (crisis years, per year)

		Total	FL	BR	PD	OC
D	Cost of solidarity transfers (in EUR mln)	92	92.2	0	0	0
E	Cost of building reception capacity for relocated war refugees (in EUR mln)	11,794	2,782	598	6,996	1,418
F	Allocated number of war refugees	600,000	144,000	36,000	318,000	102,000
G	Reception & integration costs during suspension, per asylum seeker	15,189	14,930	12,842	17,000	10,740
H = F x G	Total suspension year reception & integration costs (in EUR mln.)	9,114	2,150	462	5,406	1,095
I	Benefits of reintegration in year of immediate protection	Unknown	Unknown	Unknown	Unknown	Unknown
J	% not returned to their country		70%	73%	69%	58%
K	% assumed to make a secondary move to a preferred destination country		50%	50%	0%	50%
L = F x I x J	Number of war refugees with lifelong stay	407,862	50,752	13,140	314,233	29,737
M = A x I x J	Number of war refugees staying lifelong without solidarity	419,585	105,734	0	313,851	0

		Total	FL	BR	PD	OC
N = L – M	Change in number of war refugees staying lifelong due to compulsory solidarity	-11,723	-54,981	13,140	382	29,737
O	Cost of lifelong stay minus costs during suspension, per migrant	153,674	212,528	182,809	242,000	152,886
P	Change in cost of lifelong stay after suspension, total (in EUR mln)	-4,644	-11,685	2,402	92	4,546
Q = D+E+H+P	Total cost of option 2 (relocation) in crisis year (in EUR mln.)	16,356	-6,661	3,463	12,494	7,059
R = Q/5	Total cost of option 2 (relocation) per calendar year (in EUR mln.)	3,271	-1,332	693	2,499	1,412
	Per inhabitant	7.32	-11.34	21.81	12.38	14.70

FL, BR, PD, OC: Frontline, Balkan Route, Preferred Destination and Other Countries. See footnote to earlier table.

The third option is that of return sponsorship. This is another form of solidarity because the sponsoring country commits to permanent responsibility for irregularly staying migrants if attempts to return them to the country of origin fail.

According to data in the Swedish yearbooks of Migrationsverket, the cost of a successful return is about EUR 28,000, of which over EUR 25,000 to settle the irregular migrants in the country of origin and about EUR 2,000 to assist the country of origin in the return procedure. According to the Swedish yearbooks, the cost of a return flight is about EUR 500, and the administrative costs to prepare the return are only a few euros. For simplicity, the cost of failed attempts to return a migrant are ignored because they consist mostly of diplomatic talks by ambassadors, which the sponsoring country already employs. The cost of about EUR 25,000 to settle one irregular migrant in his country of origin may seem high, but it is much less than the estimated cost of about EUR 200,000 for a lifelong stay in a country.

In the option of return sponsorships, the likelihood of a successful return is estimated at the EU average of 34% for all countries. The reason is that countries that are less affected by migrant flows may be able to successfully return occasionally the irregularly staying migrant to their country of origin but are less likely to do so for the large numbers in a crisis year. For frontline Member States, their usually low return rate is assumed to increase to the EU average because all EU Member States make the effort to return irregularly staying migrants (and coordinated by Frontex under the proposed measures).

At the EU level, the cost of this option is similar to that of the capacity building option. One reason is the assumption that no capacity building is duplicated: the asylum seekers are assumed to stay briefly enough (4 months) in the countries of first entry before they are returned to the country of origin or relocated to the sponsoring country which then permanently takes over responsibility. This is financially the most attractive solidarity option for preferred destination countries because they would be responsible for a similar number of asylum seekers according to either the 'first entry' criterion or the 'solidarity key' criterion.

Table E.14: Estimated change in costs due to compulsory solidarity, return sponsorship option (crisis years, per year)

		Total	FL	BR	PD	OC
D	Cost of building (emergency) reception capacity (in EUR mln)		5,796	0	6,600	0
E	Cost per successful return		28,121	28,121	28,121	28,121
$F = C \times E \times 25\%$	Total cost of successful returns (in EUR mln)	4,218	1,012	253	2,236	717
G	Cost of travel to sponsoring countries after failed returns (in EUR mln)	225	54	14	119	38
H	Cost of building additional reception capacity after failed returns (in EUR mln)	1,809	0	449	297	1,063
I	Nr of asylum seekers staying lifelong	407,862	50,752	13,140	314,233	29,737
J	Nr of asylum seekers staying lifelong without solidarity	419,585	105,734	0	313,851	0
$K = I - J$	Change in number of war refugees staying lifelong due to compulsory solidarity	-11,723	-54,981	13,140	382	29,737
L	Total cost of lifetime stay after failed returns (in EUR mln)	98,042	11,277	2,511	79,501	4,753
M	Change in cost of lifetime stay after failed returns	-4,855	-12,216	2,511	97	4,753
$N = D + F + G + H + M$	Total cost of option 3 (return sponsorship) in crisis year (in EUR mln)	13,793	-5,354	3,227	9,349	6,572
$L = K/5$	Total cost of option 3 (return sponsorship) per calendar year (in EUR mln)	2,759	-1,071	645	1,870	1,314
	Per inhabitant	6.17	-9.11	20.32	9.26	13.69

FL, BR, PD, OC: Frontline, Balkan Route, Preferred Destination and Other Countries. See footnote to earlier table.

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This 'Horizontal Substitute Impact Assessment of the European Commission's New Pact on Migration and Asylum' was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE). The impact assessment focuses on the main proposed changes implied by the European Commission's New Pact, with a particular focus on the following four proposals: 1) Asylum and Migration Management Regulation (RAMM); 2) Crisis and Force Majeure Regulation; 3) Amended Asylum Procedure Regulation (APR); and 4) Screening Regulation.

The horizontal substitute impact assessment critically assesses the 'system' and underlying logic of the proposed New Pact with the aim to analyse how the four Commission proposals would work and interact in practice. The impact assessment also assesses whether and to what extent the proposed New Pact addresses the identified shortcomings and implementational problems of the current EU asylum and migration law and policy. Moreover, the impact assessment identifies and assesses the expected impacts on fundamental rights, as well as economic, social and territorial impacts of the proposed New Pact.

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